

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

789

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,657

VERNON E. PRESSLEY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

WESTERN NORTH CAROLINA BROADCASTERS, INC.,

Intervenor.

*Appeal from a Decision of the
Federal Communications Commission*

United States Court of Appeals
for the District of Columbia Circuit

APPENDIX

FILED MAY 4 1970

Nathan J. Taulman
CLERK

(i)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Application of)

WESTERN NORTH CAROLINA BROADCASTERS, INC.)

DOCKET NO. 17050

File No. BR-2977

For Renewal of License of)
Station WWIT)

Canton, North Carolina)

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

Issued May 15, 1968. ; Released: May 17, 1968

Preliminary Statement

1. On the 8th day of October, 1962, Hearing Examiner Thomas H. Donahue adopted an Initial Decision in Vernon E. Pressley, 33 FCC 838, wherein he reached certain conclusions relative to the owners of Western North Carolina Broadcasters, Inc. 1/ On the basis of the record in that proceeding and the Examiner's findings and conclusion, the Commission, on January 4, 1967, released an order designating the renewal application of Western North Carolina for hearing on the following issues:

- "1. To determine whether Dalton R. Paxton, Sidney A. Watts or other WWIT principals and agents promoted, supported or otherwise participated in the preparation and filing of the application of B. E. Bryant for a new Radio Station at Asheville, North Carolina, on 920 kc, 1 kw-DA, daytime only (File No. BP-14104, Docket No. 14009) for the purpose of impeding or obstructing grant of the application of Vernon E. Pressley for a new radio station at Canton, North Carolina, on 920 kc, 500w, daytime only (BP-12872, Docket No. 14007).
- "2. To determine whether Dalton R. Paxton, Sidney A. Watts, or other WWIT principals made misrepresentations to the Commission or concealed facts from the Commission concerning the total consideration between the parties to the application for transfer of control of the majority stock interest in the corporate licensee of Radio Station WWIT (BTC-2951, approved November 28, 1958).

1/ The findings and conclusions of the said Initial Decision are not res judicate as to Western North Carolina or its principals. Hence, Examiner Donahue's findings and conclusions are not available to this Examiner for consideration, and the Initial Decision is referred to only to establish the background of this proceeding.

- "3. To determine whether the principals of the applicant failed to file with the Commission prior to November 12, 1962, the consulting agreement entered into in December 1958 between the applicant and Beverly M. Middleton and Kermit Edney, as required by Section 1.613 of the Commission's Rules (and the instructions to FCC Form 315).
- "4. To determine whether Dalton R. Paxton or any other principal of the applicant licensee made misrepresentations to the Commission or concealed facts from the Commission in the proceeding involving the application of Vernon E. Pressley (Docket No. 14007).
- "5. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant possesses the requisite character qualifications to be a licensee of the Commission.
- "6. To determine whether, in light of the evidence adduced under the foregoing issues, grant of the above-captioned application would served the public interest, convenience and necessity."

2. The applicant published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Hearing was conducted and the record was finally closed on May 13, 1968. Proposed findings of fact were filed on March 4, 1968. 2/

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Findings of Fact

3. On October 31, 1958, an application to transfer control of Western North Carolina Broadcasters, Inc., licensee of Station WWIT, Canton, North Carolina, was filed with the Commission. The transferors, and their ownership interests being transferred were: Beverly M. Middleton, 51.58%; Evelyn H. Middleton, 9.40%; Kermit Edney, 19.74%; and Donald A. Gilmore, 10.00%. The transferees were: Sidney A. Watts; W. Barry Medlin, Jr.; Dalton R. Paxton; Frieda H. Burress; David R. Riley; and Boice M. Watts, each to acquire a 15.2% interest. The consideration was listed as \$20,000 to be paid when the sale was consummated and an additional \$20,000 plus interest in monthly installments over five years. The Commission granted the application on November 28, 1958.

4. The parties' actual understanding, which had been negotiated primarily by Middleton and Medlin, was somewhat broader. 3/ As suggested by Middleton, it contemplated that, immediately following

2/ The parties did not elect to avail themselves of an opportunity to file supplemental proposed findings on May 6, 1968, or after the final closing of the record on May 13, 1968.

3/ See para. 9, infra, re Middleton's contemporary negotiations with another potential buyer.

the consummation of the stock sale, Western North Carolina would execute an agreement whereby it would employ Middleton and Edney as "consultants" for five years at a collective salary of \$1,200 per month. Middleton asserts that his reason for proposing this arrangement was because the purchasers were without broadcast experience; if the corporation became insolvent the deferred payments under the stock purchase plan might be jeopardized; and the payments under the consulting contract would be paid out of day-to-day operations and were not to be the obligation of the individual stock purchasers.

5. Prior to the filing of the transfer application, drafts of both the stock sale agreement and the consulting agreement were prepared by local North Carolina counsel and submitted to Washington communications counsel for review. However, the application as submitted made no reference to the consulting agreement.

6. On December 22, 1958, the stock transfer was consummated and the consulting contract was executed. It provided that the corporation would employ Middleton and Edney to serve "in a consulting capacity to the extent they may be called on". The emolument of \$1,200 per month was to be paid for five years to them collectively; in the event of the demise of either, to the survivor of them; and, if both died, to the President of Radio Hendersonville, Inc., a corporation in which Middleton and Edney both held stock. The payments were not guaranteed by the stockholders of Western North Carolina, but if more than two consecutive payments should become in default the entire balance would become due and payable. On May 31, 1960, the consultation agreement was revised to provide that the then remaining balance of \$63,000 would be reduced to \$45,000 payable in annual installments of \$10,000 commencing June 1, 1960, with a final payment of \$5,000 payable June 1, 1964.

7. Neither the consulting agreement nor its revision was filed with the Commission contemporaneously, nor did the Commission become aware of them until a copy of the agreement was introduced in evidence on January 16, 1962, in the Pressley hearing referred to at paragraph 1, supra. Western North Carolina did file copies with the Commission on November 12, 1962.

8. No evidence in this hearing established directly why the Commission was not earlier advised of the existence of the consulting agreement. The details and mechanics of the filing of the transfer application had been left in the hands of Western North Carolina's communications counsel, a gentleman of considerable experience. While his testimony was unavailable due to his death in October of 1963, the essence of his advice to his clients may be gleaned from his response to a request for his opinion as to the propriety of including the aforementioned acceleration clause. In this instance, he asserted that the subject clause was "OK as far as the FCC concerned", but might create tax problems. In reporting the matter for tax purposes Western North Carolina showed the payments under the consultation agreement as ordinary operating expenditures and Middleton reported his receipts as ordinary income.

9. Vernon E. Pressley, a life-long resident of Canton had been employed at WWIT in a sales capacity from June of 1954 until

October 31, 1958. His brothers, Joe B. Pressley and C. J. Pressley were also employed at the station; C. J. full-time and Joe B. as a part-time salesman. In the summer of 1958 Vernon Pressley heard the station was for sale and entered into negotiations for its purchase. He considered the asking price of \$103,000 for 90-92% of the stock too high ^{4/}, and his counter offer of \$75,000 was rejected. Shortly thereafter he retained a consulting engineer from whom he ascertained that the frequency of 920 kc was available for use in Canton. He decided to apply for such a facility, and this decision plus the offer of a better paying job at another station led him to resign at WWIT.

-5- 10. In March of 1959, Vernon Pressley filed his application. The owners of Station WWIT did not relish the prospect of competition and their reaction was sharply antagonistic. Joe B. Pressley was fired (the employment of C. J. Pressley had been terminated shortly after the new management took over). Sidney Watts attempted to buy up an old note of Vernon Pressley's in the hope of collecting it and thereby impairing Pressley's financial qualification to own a broadcast station. Dalton Paxton had the station's consulting engineer draw up an interference chart showing the extent to which Pressley's proposed station would cause interference to existing stations. On the basis of this chart he called to the attention of the management of two stations the fact that Pressley's proposed station would cause some interference to their signals, and that they had a right to oppose a grant of Pressley's application.

11. The foregoing facts, illustrating WWIT's willingness to actively oppose a grant of the Pressley application by means other than litigation, are not in serious dispute. However, there is sharp evidentiary disagreement as to the extent which the station's principals motivated or participated in an application which was filed in competition for Pressley's proposed facility.

12. The Pressley application was processed routinely at the Commission, and on March 25, 1960 it was given a cut-off date of April 29, 1960. Thus, by operation of the Commission's rules, any application which might be mutually exclusive with Pressley's had to be filed by April 29, 1960 if it was to be accorded competitive consideration.

13. On April 29, 1960, an application was filed by B. E. Bryant proposing to utilize 920 kc at Asheville, North Carolina. The record contains several versions of the history of this application. Since they present inconsistent and irreconcilable versions of events, each will be summarized before formulating a finding as to what actually happened.

14. First; the story as presented by Bryant himself. On or about April 21, 1960, Bryant was telephoned by A. Hal Edwards, a former employee of his who also had employment experience with various radio stations. Edwards advised him that 920 kc was available in Asheville,

^{4/} Middleton's terms to Pressley apparently were not greatly different from those he finally settled on with Medlin. He told Pressley he wanted two contracts, one for \$40,000 and one for \$63,000, with a down payment of \$20,000.

-6- that the frequency was a desirable and potentially profitable one, and that if an application could be filed before April 29 it would be spared the usual long delay in processing. 5/ Although Bryant had no experience in or knowledge of broadcasting, he was an entrepreneur who was interested in any venture likely to prove profitable. Accordingly, he agreed to meet with Edwards to explore the matter. He also telephoned Dalton Paxton, a casual acquaintance during a period a few years earlier when they had both worked in Asheville. Bryant knew Paxton had gone into broadcasting, and he sought him out for advice and assistance. 6/

15. Shortly thereafter, probably on April 23, Bryant and Edwards met, and agreed that Bryant would proceed with the application. Bryant would finance the venture and be the sole applicant. However, Edwards wished to acquire an interest ultimately, and Bryant promised him an eventual 25% share "on proven ability". 7/ On April 25, 1960, acting on Edwards' suggestion, Bryant telephoned Palmer Greer, a consulting radio engineer in Greenville, South Carolina, to seek assistance in preparing the engineering portion of the application. Greer was unable to meet the April 29 deadline, and referred Bryant to Nugent S. Sharpe, a consulting engineer in Washington, D. C. On the same day Paxton called Sharpe who immediately ran a superficial preliminary check and expressed the opinion that Bryant's proposal was probably workable from an engineering standpoint. He agreed to undertake the work, specifying a retainer of \$500, and made an appointment to meet Bryant in Washington the following day.

16. That night Bryant flew to Washington accompanied by Paxton. The tickets and all substantial expenses of the trip were paid for by Bryant who brought Paxton along only because he was disinclined to travel alone.

-7- 17. On April 26 Bryant and Paxton kept their appointment with Sharpe, and Bryant gave Sharpe a legal description of the proposed transmitter site 8/, a copy of Pressley's application, and

5/ Bryant could not have realized that Edwards' statement was true but misleading. While the conflict with Pressley's application would insure expedited processing it would also insure that the applications would be designated for comparative hearing, a costly and time-consuming process.

6/ That Bryant should have turned to Paxton was a truly fortuitous coincidence. Of the thousands of broadcasters in the nation he hit upon the one who had an active desire to see some mishap befall the Pressley application.

7/ The ability which Edwards was to prove concerned "his efforts toward making the station a successful station". From this it may be inferred that Bryant contemplated that Edwards would take some role in the operation and management of the station. However, it is not clear what, if anything, Edwards was expected to pay for his interest if Bryant should ultimately be satisfied as to his ability.

8/ Sometime between meeting with Edwards on Saturday April 23 and his departure for Washington on April 25, Bryant had secured an option on a transmitter site. He selected a plot of land on the basis that a local television station had its tower in the area. He was accompanied on this mission by Edwards, and possibly by Paxton.

Bryant's retainer check for \$500. Sharpe recommended a communications lawyer to assist in the preparation of the application, but that gentleman was unable to take the case, and, in turn recommended another Washington communications attorney, Samuel Miller. Bryant visited Miller on the 26th and retained him.

18. Armed with the advice of Sharpe and Miller, Bryant and Paxton returned to North Carolina on April 26. Preparation of the application was commenced on the following day at Bryant's home. Present, at various times, were Bryant, Paxton, Edwards, Joe Cole, a sales representative of Gates Radio, and Eugene Slatkin, a boyhood acquaintance of Bryant's who was working at Station WWIT as an announcer while awaiting Commission action of his application for a new station at Black Mountain, North Carolina. Slatkin, who was selected to prepare the application because of background and recent experience, had been given permission by Paxton to trade time with another WWIT employee so as to be able to work for Bryant on April 27.

19. Bryant does not recall what instructions he gave Slatkin; who, if anyone, else gave Slatkin instructions, or how much of the application Slatkin filled out on his own initiative. He does remember, however, that he payed Slatkin \$50 in cash for his services.

20. Bryant engaged in one other piece of business on April 27. At that time he was engaged in the promotion of oil properties in Kentucky. He had discussed oil speculation with Paxton during this period, and on this date he sold Paxton 1/32nd interest in a 10-acre site in Green County, Kentucky for \$500.

21. On April 29 Bryant and Paxton again flew to Washington. Bryant, unaccompanied by Paxton, again conferred with Miller and Sharpe. Neither was satisfied with the application as prepared by Slatkin and substantially reworked it. On this trip Paxton also consulted his own lawyer. The revised application was filed on April 29.

-8- 22. On October 9, 1961, Bryant moved to dismiss his application, which motion was granted on October 17, 1961. He was motivated by the substantial amounts of money and effort he had been required to expend 9/, and the prospect of even more substantial amounts to be expended in the further prosecution of the application. Bryant received no reimbursement of his expenditures from any source.

23. Paxton's recollection of the incidents surrounding the Bryant application does not differ greatly from Bryant's, although viewed from a different vantage point. He testified that he encountered Edwards at a political rally in Asheville, North Carolina on April 20, 1960. Although he denied having spoken to Edwards privately on that occasion, and denies having discussed with anyone the possibility of an application being filed to conflict with Pressley's, he does recall

9/ His payments to his engineer had totalled \$1,700, and he had also paid fees to his attorney as well as the expenses of travel for himself and Paxton.

that there was general discussion of the Pressley application. He specifically denies having reached any understanding of any kind with Edwards or of encouraging Edwards in any way to interest himself in the filing of an application which would compete with the Pressley application.

24. However, he asserts that he received a telephone call some two or three days after the rally from Bryant, a casual acquaintance whom he had not seen for some time. Bryant was seeking help for his proposed radio venture, and Paxton assured him that he "would be glad to do what I can do for you". However, he does not recall any discussion of Pressley's application on that occasion. 10/

25. Paxton recalls the April 25-26 trip to Washington, and his recollection of the details does not differ materially from Bryant's. He also recalls adjusting Slatkin's work schedule so he could prepare Bryant's application on April 27, and he acknowledges that he was at Bryant's house on that day, although he denies seeing Edwards there. He remembers giving Bryant the \$500 check for the oil lease on April 27. He has never had any other business dealings with Bryant before or since.

-9- 26. At about this same time Paxton delivered another WWIT check. This one, dated April 30, 1960, was to Slatkin in the amount of \$50. Paxton denies that this check was connected in any way with Slatkin's work on the Bryant application. Rather, he testified, it was in payment for Slatkin's work on a new programming format at WWIT. 11/

27. Paxton also remembers the April 29 trip to Washington with Bryant. He asserts that he mostly went along as a companion, and that on this occasion, as on April 26, Bryant paid all of the material expenses. However, he does recall that he accompanied Bryant on his visits to both Sharpe and Miller.

28. Paxton also testified to a third trip to Washington in May, 1961, accompanied by Bryant and by Paxton. This trip was occasioned by the fact that on April 24, 1961, Pressley had filed a motion to enlarge issues in the consolidated hearing that had been designated between his and Bryant's application, asserting that Bryant had filed a "strike" application at the instigation of Western North Carolina. Paxton believed that the defense of this charge was a matter of common interest to himself and Bryant, hence they travelled together to

10/ Considering Western North Carolina's admittedly strong opposition to the advent of competition at this time, Paxton's failure to even mention the matter when unexpectedly confronted with this heaven-sent impediment to Pressley's application constitutes a truly remarkable display of restraint..

11/ It is not disputed that Slatkin did work on the new format, and that the format was adopted and is now in use. However, the record also establishes that virtually everyone else at WWIT worked on the format, but that Slatkin was the only one to be paid extra. What is not clear from the record is whether and to what extent Slatkin's work may have differed in quality or quantity from that of his fellow employees.

consult their respective attorneys. The expenses of this trip were shared, Paxton paying the airline charge through the use of a credit card obtained in a trade-out. Finally, in the fall of 1961, Paxton accompanied Bryant to Washington when he went to dismiss his application. On this occasion each paid his own expenses.

29. Edwards' version of events is substantially different. As does Paxton, he places the start of the affair at the political rally in Asheville on April 20, 1960. Edwards asserts that he and Paxton spoke privately, that Paxton broached the subject of the opportunity presented by 920 kc in the area, and that Paxton suggested that with Edwards' broadcasting background he might be the one to take advantage of it. Edwards protested that he was financially unable to undertake such a venture, to which Paxton responded that he would be the financial backer. Paxton then, according to Edwards, asked him if he could suggest anyone who might be willing and financially able to apply for the frequency, but Edwards could think of no one at the time.

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30. However, on the following day, Edwards thought of Bryant, for whom he had once worked, and suggested him to Paxton. Although Paxton did not then know Bryant, he approved the approach. Two days later Edwards called Bryant who expressed interest, and the two men met subsequently to discuss it at greater length. 12/

31. Edwards then introduced Bryant and Paxton who had not theretofore met. On this point Edwards is more positive than consistent. At one time (Tr. 1295) he recalled introducing the two over the telephone on Friday, April 22, and on Monday, April 25, being picked up at his office by Paxton and the two driving together to Bryant's office where he introduced them in person. In another version (Tr. 1167-72) Edwards introduced Bryant and Paxton at Bryant's home, sometime during the week of April 20-27, Paxton arriving after Edwards rather than with him. 13/

32. Edwards' version of the meeting at Bryant's home on April 27 had him arriving at approximately 2:00 p.m., at which time Bryant, Slatkin and Paxton were already there (Tr. 1204). 14/ He recalls that Paxton gave Slatkin a \$50 check on that occasion. He also

12/ It is unclear just when and under what circumstances Edwards and Bryant first met face-to-face to discuss the matter. At times Edwards testified that Bryant came to his office on Friday, April 22 (Tr. 1295). At other times he asserted that they did not meet prior to a dinner engagement on Saturday, April 23 (Tr. 1199, 1202).

13/ From the participants Edwards identified as being at this meeting and the work he testified was done there it is apparent he had reference to the meeting of April 27 (paras. 18 and 25, supra). It seems unlikely that Edwards did introduce the two for the first time on this occasion in light of the undisputed evidence that they had flown to Washington together on the previous day.

14/ As noted at para. 31, supra, at another point in his testimony Edwards asserted that Paxton arrived after he did (Tr. 1171).

recalls that Paxton left before Cole arrived, specifically because he did not want Cole to see him at the meeting. 15/

-11- 33. Some two to four weeks after the Bryant application was filed it occurred to Edwards that it was, in fact, designed to block the Pressley application. Upon realizing this he initiated a series of calls to Bryant importuning him to dismiss the application. When Bryant declined to do so Edwards called Vernon Pressley and revealed the whole matter to him. Sometime during his conversation with Pressley the subject of money arose, and Edwards told Pressley he had some \$1,100 invested in the Bryant application. 16/. Following this conversation Edwards executed and gave to Pressley an affidavit setting forth his knowledge of the Bryant application.

34. Edwards also suggested to Bryant that he employ local Asheville counsel, and recommended Mr. Fred N. Sigman, Jr. Edwards contacted Sigman, and suggested that he might want to accept a small ownership interest in the station in lieu of fee for any services he might perform. He denies discussing any other aspect of this or any other radio proposal with Sigman.

35. Sigman testified in rebuttal of Edwards. He stated that in June, 1960 he met with Edwards at the latter's request. Edwards told him that over some years he had been working up plans for a radio station in Asheville, and that he had now gone into it as a joint venture with Billy E. Bryant. Edwards further told Sigman that he would want him to do all of the legal work locally. Several weeks later Edwards called Sigman and told him that he was in immediate need of \$10,000 to take up the option on the transmitter site. He offered inducements to Sigman to find the cash, but, although Sigman tried, he was unable to do so.

36. Finally, there is the testimony of Eugene Slatkin, who was employed at WWIT from February to around the end of April, 1960. He asserts that on or about April 26, 1960, Paxton, who was his superior at WWIT, telephone him at home (or the contact may have been at work (Tr. 309)), and asked him to help prepare the Bryant application. 17/.

15/ Edwards coupled this testimony with the assertion that it was Paxton himself who invited Cole to the meeting.

16/ Edwards contends that after he had told his story Pressley asked him what would be a fair price, if Pressley should choose to reimburse him for his expenses, and he replied \$1,100. Pressley's version is that Edwards volunteered that he had \$1,154 in the Bryant application, and that he would give Pressley an affidavit if the sum were reimbursed him. In any event, it is clear that the contact with Pressley was initiated by Edwards, and that he had not expended any material or identifiable sums of money on the Bryant application. He asserted that the primary theory for which he sought reimbursement was the value of his time. Although it is not clear how much time Edwards devoted to the Bryant application, it plainly aggregated much less than one full day. At the time Edwards was employed at a salary of \$140 per week.

17/ Actually, Slatkin is less than certain as to when he was originally contacted; or by whom (Tr. 311).

- 12- Slatkin went to Bryant's home on April 27, and undertook to work up various portions of the application form. While there he was given a check for \$50 by Paxton, that sum representing payment for his work for Bryant. 18/

37. Slatkin has had previous opportunities to tell the Commission his story. On May 5, 1961, he executed an affidavit swearing that in April, 1960 Bryant asked him to assist in the preparation of the application; that he did so; and that Bryant paid him \$50 in cash. On September 9, 1961, he executed another affidavit wherein he swore that his assistance to Bryant was rendered only after Paxton 'phoned him at his home; "directed" him to cooperate with Bryant; and arranged for a fellow employee to work his shift. In this affidavit Slatkin again swore that Bryant had paid him \$50 in cash, and that, although he received a \$50 check from Paxton, it was in payment for his work on the new program format. 19/ On November 24, 1961, Slatkin executed a further affidavit for the purpose of clarifying his May and September oaths. This time he swore that Bryant had telephoned to ask his assistance in preparing the application, but that Paxton had seen him personally and requested that he assist Bryant.

38. Slatkin was called to testify in the hearing on the Pressley application. On that occasion he asserted that around April of 1960 he received two \$50 payments: one in cash from Bryant for his help on the application; and the other by check from Paxton for his work on the new program format.

39. Two final matters as to Slatkin should be noticed. First, in a conversation with Vernon Pressley at a time when it was uncertain just what Slatkin might swear to he told Pressley "that Mr. Paxton needed a friend, Mr. Bryant needed a friend, and that I. (Pressley) needed a friend and he (Slatkin) needed money" (Tr. 536). Second, in a Memorandum Opinion and Order released July 8, 1963, Mountain View B/Casting Co., 25 RR 711, the Commission revoked Slatkin's license for Station WBMT, Black Mountain, North Carolina, primarily for a series of misrepresentations and false statements to the Commission.
- 13-

40. From the conflicting versions of events set forth at paragraphs 14-39, it is necessary to formulate findings of fact. In the Examiner's opinion the testimony of Slatkin and Edwards is entitled to no weight whatsoever in determining the facts. Slatkin

18/ Slatkin also testified that he did not get the \$50 check that day, but received it later (Tr. 314). Specifically, he testified that it was about a week after the date of April 30, 1960 appearing on the face of the check (Tr. 326).

19/ The September 9, 1961 affidavit is, in large measure, a copy, in places verbatim, of an affidavit of Joe Pressley submitted to the Commission earlier in connection with a petition filed by Vernon Pressley. When Slatkin executed the affidavit Pressley's lawyer was present. At that time Vernon Pressley had pending in the courts of North Carolina an action against Slatkin. It was later dismissed.

is an out-and-out liar whose misrepresentations have required the Commission to revoke his license. He blatantly offered his testimony to Pressley for a price, even warning him that it was for sale to the highest bidder. On the very facts now at issue he has knowingly and deliberately sworn to irreconcilably conflicting versions of events. It is apparent that much of what he has said was false; and it would be sheer speculation to assert what portion, if any, of his various tales is true. Responsible men in the conduct of their affairs would be ill-advised to act upon the statements of any man who has displayed Slatkin's contempt for truth. This initial decision will not rely upon him.

41. Edwards fares but little better. Assuming, arguendo, that his version of events was true, the Bryant application was a "strike" application from its inception and Edwards could not have failed to know it. For him to swear now that he did not become aware of its true nature until some time later is incredible, and the fact that he makes such assertion renders his whole testimony suspect. Moreover, his story is implausible in its basic premise. He asks the Commission to believe that he turned down Paxton's invitation to file in his own name because he lacked the resources to finance it, yet he claims Paxton was to furnish the financing himself. One assertion or the other must fall: either Paxton was going to put up the money, in which case there was no earthly need for Edwards to dilute his ownership share by bringing in Bryant; or Bryant was needed to capitalize the venture, in which case the assertion that Paxton was to finance it is false. When these fundamental incongruities are coupled with the inconsistencies of detail set forth at paragraphs 29-34, supra, it becomes very difficult to regard Edwards as a reliable witness. In addition, there are other impediments to crediting his testimony. Mr. Fred Sigman, a member of the Bar and a disinterested witness, tells of events sharply conflicting with Edwards' version of the scope and extent of his own activities. Sigman's testimony reveals that at the time these events transpired, Edwards made no claim, even to the man he sought to employ as attorney, that Paxton was involved in the application. Of at least equal importance is the revelation that Edwards sought to raise a substantial sum of money in connection with the application, a fact wholly inconsistent with the claim that Paxton was financing the entire affair. Finally, there is the fact that Edwards, in effect, told Pressley that his testimony was for sale and named his price. It has been quite a number of centuries since jurisprudence has placed value on the testimony of strawmen. Plainly, Edwards' testimony is false in vital areas. He has forfeited the right to be believed, and no portion of this initial decision will rest upon his statements.

42. From the foregoing it does not follow that the testimony of Bryant and Paxton must be accepted in its entirety. Their testimony must be weighed in the context of the circumstances, and in that context their version of events strains credulity. That Bryant initiated contact with his counsel acquaintance, Paxton, is possible; that within a few days after their renewed contact Paxton ventured into an oil speculation, paying Bryant therefor the exact sum he needed to pay his engineer's retainer, is possible; That Paxton left his business and went flying off to Washington twice within one week just so this casual acquaintance wouldn't be lonely is possible;

that Paxton rearranged the work schedule of his employees solely as a gesture of innocent cooperation for his friend Bryant is possible; and that Edwards initially promoted the venture on his own initiative, but that Paxton immediately took over the role of principal advisor with Edwards being redelegated to an inconspicuous position is also possible. All of these things are possible, individually, and it is even possible that each of them occurred. But, this Examiner does not believe it.

43. The principals of Western North Carolina displayed a willingness to do what might be necessary to prevent competition in Canton. Watts attempted to buy up Pressley's note in a crude attempt to crush him in a financial squeeze. Western North Carolina bought and paid for an interference chart on Pressley's application for which its principals had no conceivable use other than to attempt to embroil Pressley's application in litigation before the Commission. Having engaged in such tactics they must expect to have all of their activities judged with the gravest suspicion. So they shall be.

44. It is found that sometime prior to April 21, 1960, probably at the political rally on April 20, Paxton and Edwards talked, and that Edwards gained the impression that if he could find a suitable party to file an application in conflict with Pressley's Paxton would suitably reward him. 20/ Paxton's reason for utilizing Edwards was that he could not afford to search for a suitable individual himself since the risk of such a search becoming known would be too great.

45. Edwards came up with Bryant who may or may not have been known to Paxton before. In any event, Bryant was advised of Paxton's interest in the matter as soon as he had indicated his own willingness to participate. Time being of the essence, and engineering being the most time-consuming portion of the application to prepare, Paxton had Bryant contact an engineer immediately. After an engineering consultant had been retained, Paxton made available to Bryant the cash to pay the engineer's retainer. The record furnishes no basis for a finding as to the precise understanding by which the \$500 was made available to Bryant. Quite possibly the matter was never spelled out between the two men. Nevertheless, it is a fact that Bryant needed \$500 in cash right at that moment, and that Paxton, who knew him only casually and had never done business with him before, chose that moment to buy an oil lease, a type of speculation in which he is not shown to have engaged before or since, for the exact sum which Bryant needed. 21/ The inference is strong, and it is found, that Paxton's basic motive

20/ Most probably the inducement was to be Paxton's contribution in some amount toward an ownership interest by Edwards. Such explanation would best accord with Edwards' subsequent activities and his claim to Sigman that he was part owner.

21/ The Examiner deems it significant that the record fails to show that Paxton ever recorded the lease. Since the prompt recordation of a mineral lease is a step of elementary business prudence, the failure of any businessman to do so casts doubt as to whether the lease represented a routine business transaction.

for giving Bryant \$500 at that particular time was to enable Bryant to defray the engineering retainer.

46. Thereafter, until April 29, 1960, on which date the Bryant application was filed, Paxton cooperated and assisted Bryant in every way open to him. He made available an employee of WWIT who was knowledgeable in the preparation of applications; he himself was present at and assisted in the drafting of the application; and he twice traveled with Bryant to Washington to lend him such aid, support and comfort as he might.

47. There is no basis for a finding that any principal of Station WWIT made any financial contribution to Bryant other than the \$500 check heretofore referred to, or received or expected to receive any ownership interest in the Bryant proposal.

-16- 48. The record also contains evidence as to two meetings between Vernon and/or Joe Pressley and principals of Western North Carolina. One meeting was with Paxton, the other with Watts. The evidence is conflicting as to who initiated the meetings and what transpired thereat. However, it is not material to the disposition of the designated issues to resolve these conflicts or to make findings of fact regarding the meetings. If the Pressleys' version were to be accepted it would only tend to demonstrate that Paxton and Watts were attempting to discourage prosecution of Vernon Pressley's application by various means not directly related to the Bryant application, and this point has already been made. If the Paxton-Watts version were accepted, the Pressleys would be put in a bad light, but resolution of the designated issues would not be advanced. Under such circumstances, no useful purpose would be served by a detailed analysis of the record or the composition of precise findings of fact.

Conclusions

49. Dalton R. Paxton, a principal of Western North Carolina Broadcasters, Inc., participated in the preparation and filing of the application of B. E. Bryant for a new radio station at Asheville, North Carolina. He interested and recruited Bryant as an applicant through the agency of Hal Edwards. He provided the cash by which Bryant met his initial expense as an applicant. He made available the technical knowledge of his employees. Finally, with his aid, comfort, support and presence he shepherded Bryant through the process of filing an application for a radio station.

50. This is not a case where a licensee employs a non-participant to provide a name in which to file an application he is precluded from filing himself. Bryant is a businessman with some experience. Quite possibly, had the application been granted, he would have produced the financing for his own station and operated it himself without soliciting or accepting any participation by Western North Carolina or its principals. Nevertheless, the fact remains that his interest in the venture was engendered through Paxton's efforts, and that during the crucial days immediately preceding the filing of the application Paxton lavished on the Bryant application the same attention and effort he might have expended had the application been

his own. These things he did at a time when he and his associates were demonstrating a willingness to take such steps as might be necessary to forestall the advent of competition in Canton.

51. Thus, it is concluded that Paxton's participation in the Bryant application was motivated by a desire to obstruct or delay the grant of the Pressley application. Such is improper, Blue Ridge Mountain B/Casting Co., Inc., 2 RR 2d 511.

-17-

52. This record establishes that the present principals of Western North Carolina misrepresented to the Commission the true consideration paid for the transfer of control of the corporation to them. The Commission required that they report the consideration paid for their stock; that is to say, what benefit they conferred on the sellers. It is plain that what was paid was not merely the \$20,000 cash and \$20,000 deferred that was reported. A very substantial additional sum was to be paid to the sellers, and if this sum had not been paid the deal would not have been made. To call the additional sum a non-related payment for consultive services was a subterfuge and a very transparent one at that. The consulting agreement carries every badge of a sale of property and none of a contract for services. The work to be done is not defined with any sort of precision, either as to its nature or its extent. The obligation to pay for the consulting services is not abated even if both consultants should die prior to the time when they might perform any services. Nevertheless, an exact schedule of payment is set up and provision, even including an acceleration clause, is made to protect the sellers in the event of default. At the very time the sellers were negotiating this arrangement they declined to sell their stock to another potential buyer for nearly twice the price ostensibly paid by the Paxton-Watts group simply because the other prospect would not include a "consulting agreement". Beyond doubt, the "consulting agreement" was an integral part of the consideration paid for the Western North Carolina stock.

53. In assessing the significance of the failure to report this portion of the consideration it is essential to determine whether it was calculated or inadvertent. Since the record does not speak directly to the reason for concealment of this information, the motive must be inferred from the circumstances, chiefly from the parties' reasons for using the device of a "consulting contract".

54. Beverly Middleton, one of the sellers, asserts that he insisted on the procedure as a method of enhancing the likelihood that the deferred balance of the purchase price would, in fact, be paid. Such an explanation strains credulity. The buyers lacked broadcast experience irrespective of the arrangements made to secure their obligations arising from the stock purchase. Whatever dependence they might have on the day-to-day receipts of the station to pay off those obligations was not lessened because their individual assets were not to be held accountable for any deficiency in the ability of station revenues to carry the bulk of the indebtedness. Creditors do not ordinarily consider their debts to be rendered more probable of

-18- satisfaction by insisting upon a lesser security, and there is no reason to believe that Middleton is an exception.

55. The explanation, then, is to be sought elsewhere, and it would be unrealistic to fail to consider the tax consequences of the parties' actions. Middleton, and presumably his fellow sellers, treated the proceeds of the consulting contract as ordinary income received over a period of years rather than as a capital gain. While such a procedure has a potential tax advantage, the record contains insufficient information to determine whether, in fact, such an advantage accrued to the sellers in this instance.

56. However, the tax advantage to the buyers is very plain. The payments made under the consulting agreement were treated as ordinary operating expenses, that is to say they were set off against the revenues of the station. As such, they reduced the taxable income received by Western North Carolina. Thus, the station's revenues could, up to the amount of payment called for under the consulting contract, be used tax free to pay off a portion of the purchase price. Such an inducement furnishes adequate motive for the utilization of the device of a "consulting agreement".

57. It also furnishes adequate motive for not mentioning the "consulting contract" as part of the consideration at the time the transfer application was filed. Had the parties acknowledged to the Commission at that time that the "consulting agreement" was part of the consideration, they would have been hard pressed to maintain otherwise before other agencies of the government. Hence, their choice lay between failing to report the true facts to this Commission or abandoning their tax advantage. They opted for the former course. It is concluded that the principals of Western North Carolina knowingly and wilfully misrepresented to the Commission the true consideration paid by them to acquire control of the corporation.

58. Issue 3, as framed, does not inquire whether Rule 1.613 and the instructions to FCC Form 315 required the applicant to file a copy of the consulting agreement with the Commission at the time it was executed. Rather, the issue presupposes such a requirement and inquires whether it was met. The answer, of course, is that the agreement was not filed at or about the time of its execution.

-19- 59. Issue 4, inquires as to whether the principals of Western North Carolina misrepresented or concealed information in the hearing involving the Pressley application. Neither Western North Carolina nor its principals were a party to that hearing, although certain of the principals appeared as witnesses and answered the questions put to them. Their testimony, while in considerably less detail, did not differ materially from that given in this hearing. If misrepresentations have been made to the Commission, they appear in a much more complete and contemporary form on the record of this hearing, and it would be superfluous to consider them in the context of the Pressley hearing.

60. In sum, it has been concluded that certain of the principals of Western North Carolina have violated the Commission's regulatory concepts in two significant particulars. Dalton Paxton

participated in a "strike" application designed to block or impede the advent of competition in Canton, and at the time the present principals acquired control of the station they knowingly misrepresented to the Commission the true consideration which they paid for their interest. These offenses are not trivial, and each has been ground for disqualification in the past.

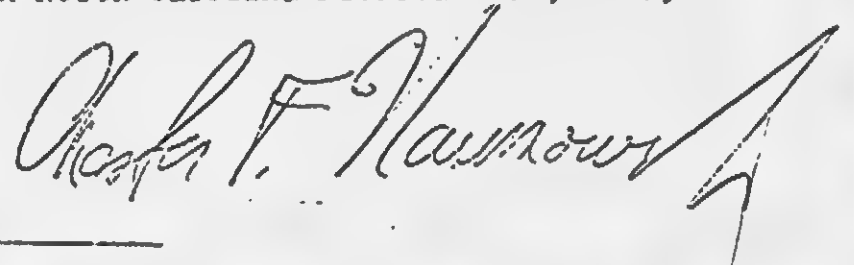
61. In Capitol B/Casting Co., 20 RR 979, 1011; Blue Ridge B/Casting Co., Inc., 2 RR 2d 511; and Al-Or B/Casting Co., 3 RR 2d 889, the Commission has denied applications which it found to have been filed to block or impede the grant of another application. In effect, the Commission ruled that the applicants had abused its processes by submitting proposals motivated by reasons ulterior to a mere desire to construct and operate the station applied for. The role played by the principal of the existing licensee of the station the "strike" application is designed to protect is no less an abuse of process. If the strike applicant lacks the character qualifications to be a licensee, the qualifications of the licensee in collusion with him are no higher. Paxton's participation in the Bryant application in order to insulate Western North Carolina from local competition warrants a denial of his corporation's application for renewal of its license, and it is not exculpatory for the applicant that none of its principals other than Paxton is shown to have participated in the Bryant application. Even if it were to be assumed he acted without the knowledge of the other principals of Western North Carolina, each licensee must be held legally responsible for the misconduct of its employees and officers, Edina Corp., 7 RR 2d 767.

-20- 62. The matter of misrepresentation is at least as serious. The scheme of the Commission's administration of the Communications Act is based on the requirement that submissions to it shall be candid and complete. If any substantial number of parties depart from this standard the entire concept breaks down. Consequently, the Commission cannot countenance deliberate misrepresentation, nor has it done so, WMOZ, Inc., 1 RR 2d 801; WDUL Television Corp., 25 RR 510; Palmetto B/Casting Co., 23 RR 483; Eleven Ten B/Casting Corp., 22 RR 699; Leo Joseph Theriot, 22 RR 237. When the misrepresentation is coupled with participation in a "strike" application the ultimate conclusion as to the applicant's character qualifications must be adverse.

63. It having been concluded that the applicant lacks the character qualifications ordinarily required of a licensee, and no countervailing factors having been advanced, it is further concluded that a grant of the subject application would not serve the public interest.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the initial decision on its own motion in accordance with the provisions of Rule 1.276, the application of Western North Carolina Broadcasters, Inc., IS DENIED.

Chester F. Naumowicz, Jr.
Hearing Examiner
Federal Communications Commission



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TO: The Commission

BROADCAST BUREAU'S
EXCEPTIONS TO INITIAL DECISION

Preliminary Statement

On May 17, 1968, Examiner Naumowicz released his Initial Decision in the captioned proceeding (FCC 68D-37) in which he denied the application of Western North Carolina Broadcasters, Inc. (WWIT) for renewal of license.^{1/} He predicated the denial on his conclusions (1) that one of the principals of WWIT had participated in the preparation and filing of a strike application and (2) that the principals of WWIT had knowingly and willfully misrepresented to the Commission the true consideration paid by them to acquire control of the corporation by not filing with the Commission or otherwise advising the Commission of the "consulting" agreement entered into by the sellers and the corporation. The record in this proceeding presented a close question for resolution on the strike application issue. Ordinarily, on a close question

^{1/} The time for filing Exceptions has been extended to July 17, 1968.

such as here presented, the Broadcast Bureau would not except to the Examiner's judgment, even though it had arrived at a contrary conclusion in its Proposed Findings and Conclusions. However, the Bureau does not believe that certain of the findings of the Examiner which are critical to resolution of the strike application issue are properly reflective of the record.

Exception 1

To the failure of the Examiner to find in connection with the last sentence of paragraph 8 of the Initial Decision that the amount reported as paid under the consulting agreement was of such a magnitude in relation to the amount of income and other expenses reported by WWIT in tax returns so as to alert any reviewing tax authority to inquire into the nature of the consulting agreement and the validity of the deduction of the payments as ordinary operating expenditures (T. 1449, 1452, 1453).

Exception 2

To the last sentence of footnote 11 to paragraph 26 as being contrary to the record.

Exception 3

To paragraph 44 of the Initial Decision and footnote 20 thereto as being conjectural and based upon testimony which the Examiner correctly rejected.

Exception 4

To the first sentence of paragraph 45 of the Initial Decision as conjectural and without record support.

Exception 5

To the ultimate findings in paragraph 46 that "Paxton cooperated and assisted Bryant in every way open to him" and that Paxton "was present at and assisted in the drafting of the application" as not supported by basic findings of fact in the Initial Decision or by the facts of record.

Exception 6

To the first two sentences of paragraph 49 of the Initial Decision as conclusions not supported by the facts of record.

Exception 7

To the first clause of the fourth sentence of paragraph 50 of the Initial Decision as a conclusion not supported by the facts of record.

Exception 8

To the fourth sentence of paragraph 54 of the Initial Decision as a non sequitur.

Exception 9

To paragraph 57 of the Initial Decision as a conclusion not warranted by the facts of record; and to the failure to conclude instead that, although the principals of WWIT were required under the terms of Section 1.613 of the Rules to file the consulting agreement with the Commission, their failure to do so cannot be found to be willful or for the purpose of misrepresenting or concealing facts. Therefore, although the failure to file constituted a violation of Section 1.613, it does not

Commission process in purported participation in the Bryant application, as not supported by fact and law. The Examiner should have concluded, based on the evidence, that Paxton's activities were not such as to warrant denial of the application for renewal of license of Station WWIT.

Exception No. 43: To the conclusion in Paragraph 62 that the principals of Western North Carolina Broadcasters, Inc., made deliberate misrepresentations to the Commission concerning the consideration paid for their controlling interest in WWIT, as not supported by fact and law. The standards of the Rule are vague. There is no evidence of any violation of the Rule, let alone a willful one. In any event, even assuming that the Rule was not complied with, the circumstances in this case do not warrant refusal to renew the license of WWIT.

Exception No. 44: To the conclusion of Paragraph 63 insofar as the Examiner failed to consider, in light of all of the evidence, whether the circumstances presented justified a short-term renewal for Station WWIT.

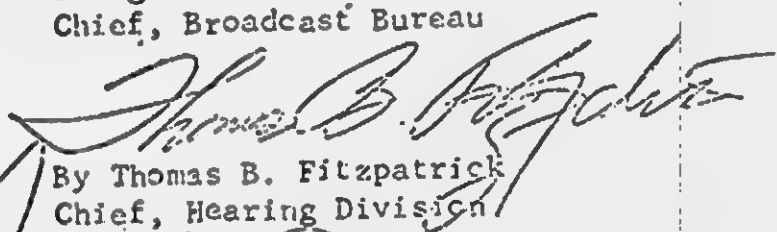
Exception No. 45: To the ultimate conclusion that the application of Western North Carolina Broadcasters, Inc., should be denied, as contrary to the weight of the evidence, unsupported by the record, and inconsistent with Commission

reflect adversely on the applicant's character qualifications as a licensee of the Commission.

Exception 10

To the ultimate conclusions in paragraphs 60-63, insofar as they relate to the matter of misrepresentation arising out of the consulting agreement as not warranted by the record, and insofar as they relate to the "strike" application issue to the extent that they are based on findings which lack record support.

Respectfully submitted,
George S. Smith
Chief, Broadcast Bureau


By Thomas B. Fitzpatrick
Chief, Hearing Division


John F. Reilly
Attorney
Federal Communications Commission

September 17, 1968

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BROADCAST BUREAU'S BRIEF
IN SUPPORT OF EXCEPTIONS

1. Exception 1 is directed to the absence in the Initial Decision of a finding based upon the testimony of a tax expert that the size of the amount paid by WWIT under the so-called consulting agreement which it claimed as an operating expenditure was so disproportionate to the other operating expenses and the total income reported that it would have flagged the attention of any reviewing tax authority as an item to challenge. The testimony is significant because the Initial Decision concludes that the principals of WWIT knowingly and willfully misrepresented to the Commission the true consideration paid by them to acquire control of the station by not disclosing the consulting agreement and that the reason for the misrepresentation was that the principals of WWIT "would have been hard pressed to maintain otherwise before other agencies of the Government" had they told the Commission that the consulting agreement was part of the consideration. In the view of the Bureau, this is a conclusion that is hard to justify on the basis of the record. The very size of the annual payments under the agreement in itself was an open invitation to tax authorities to inquire into the agreement. Individuals sophisticated enough to come up with the rationale attributed to them in paragraph 57 of the Initial Decision would have been sophisticated enough to realize that claiming as ordinary operating expenditures consulting fees of that magnitude would be calculated to arouse suspicion. This being so, it strains logic to conclude, as

does the Initial Decision, that the principals of WWIT deliberately failed to advise the Commission of the existence of the consulting agreement for the sole purpose of deluding the Internal Revenue Service. It is particularly difficult to accept such a conclusion as justification for the denial of an application for renewal of license on the ground of deliberate and willful misrepresentations made to the Commission. The Bureau is of the view that the record discloses no reason why they should have willfully withheld the agreements from the Commission. There is no reason to believe that the Commission would not have approved the transfer of control for a total price of \$112,000. The consulting agreement reserved no elements of ownership or control to Middleton and Edney and hence was not objectionable on that score.

2. Exception 2 is directed to the last sentence of footnote 11 of paragraph 26 of the Initial Decision which indicates that, in connection with the \$50.00 check Slatkin was given by Paxton, it is not clear from the record "whether and to what extent Slatkin's work (on a new programming format for WWIT) may have differed in quality or quantity from that of his fellow employees." Contrary to this assertion, the record reflects that the idea for the "Tempo" format was first put forth at WWIT by Slatkin, that he was the only one at the station to have had prior experience with an all-music format and that he was the only one to prepare written material in connection with the format (T. 1080).

3. Exception 3 relates to paragraph 44 of the Initial Decision and footnote 20 thereto. The ultimate findings in this

paragraph and in the footnote find no support in the record except in Edwards' testimony and the Initial Decision categorically rejects Edwards' testimony. The last sentence of the paragraph reads as follows: "Paxton's reason for utilizing Edwards was that he could not afford to search for a suitable individual himself since the risk of such a search becoming known would be too great." This rationale cannot be accepted since it runs contrary to established facts of record. First, Paxton telephoned a Mr. Frisbie several times in connection with Pressley's application because of an interest in broadcasting which Frisbie's employer had shown (T. 867-69, 1043-44). Second, Paxton was already acquainted with Bryant and would not have needed the intervention of Edwards, had he been the motivating force behind Bryant's deciding to file an application (T. 155, 872-73, 1339).

4. Exception 4 is directed to the first sentence of paragraph 45 of the Initial Decision. A finding is made that Bryant may or may not have been known to Paxton prior to Edwards' bringing them together. The only basis in the record for such a supposition is the testimony of Edwards which has been rejected. On the other hand, see the citations listed in paragraph 3, above, which establishes that Bryant and Paxton had been casual acquaintances.

5. Exception 3 is directed to the ultimate findings in paragraph 46 that "Paxton cooperated and assisted Bryant in every way open to him" in that, inter alia, Paxton "was present at and assisted in the drafting of the application" (underscoring supplied). The record does not support such ultimate findings. On the contrary, the record is clear that during the period

when Paxton was at Bryant's home on April 27, 1960, he did not supervise Slatkin's work and made no suggestions concerning, or changes in, the material prepared by Slatkin. He did not see Slatkin's work product (T. 168-69, 232, 966, 987-88, 1328).

6. Exception 6 is directed to the conclusions in paragraph 49 of the Initial Decision that Paxton participated in the preparation and filing of Bryant's application and that he interested and recruited Bryant by means of Edwards. Each of these has been discussed earlier in the brief. See paragraphs 3 and 5, above. The record does not support these conclusions.

7. The fourth sentence of paragraph 50 of the Initial Decision (Exception 7) again erroneously concludes that Bryant's interest in filing was engendered by Paxton. See paragraph 3, above. Further, the record reflects that Paxton did not participate in the first draft of the application which was prepared by Bryant and Slatkin. He did not participate in the preparation of the final application. It is true that he was present at Bryant's home on April 27, 1960 in connection with the assignment of a share in the oil lease, but he left around noon. The work on the application continued until late afternoon (T. 166-69, 199, 200, 209, 214, 232, 966). As has been stated in paragraph 5, above, Paxton did not review or comment on Slatkin's work and made no suggestions.

8. The fourth sentence of paragraph 54 of the Initial Decision, which is the subject of Exception 8, relates the fact that payments under the consulting agreement were the obligation of the corporation, rather than that of the individual stockholders. The sentence reads:

"Whatever dependence they might have on the day-to-day receipts of the station to pay off those obligations was not lessened because their individual assets were not to be held accountable for any deficiency in the ability of station revenues to carry the bulk of the indebtedness."

The statement is true enough as far as it goes. However, it overlooks an advantage to Middleton and Edney inherent in a contract with the corporation. Under such an arrangement, they could look to the physical assets of WWIT in the event payments were not made, including a possible retransfer of control, rather than having to bring suit individually against each of the purchasing stockholders (see T. 1188).

9. Exception 9 is directed to paragraph 57 of the Initial Decision which concludes that the principals of WWIT knowingly and willfully misrepresented to the Commission the true consideration paid by them to acquire control of the corporation. This relates again to their failure to notify the Commission concerning the consulting agreement at the time the transfer application was filed. This has been discussed at length in paragraph 1, above.

10. Paragraphs 60-63 of the Initial Decision (Exception 10) conclude that WWIT lacks the character qualifications to be a licensee of the Commission based upon the conclusions, discussed above, that Paxton had participated in the filing of a strike application and that the principals of WWIT had made misrepresentations to the Commission as to the true consideration for the purchase of control. The Bureau does not believe that the facts of record and the reasonable inferences to be drawn therefrom justify the conclusions that the principals of WWIT

deliberately withheld from the Commission the fact that a consulting agreement was going to be entered into between the seller and the corporation as part of the consideration to further a scheme to lessen their tax liability. This is the only reason put forth in support of the conclusion that the principals of WWIT were guilty of deliberate misrepresentation. It is just as reasonable to assume that the sellers desired this arrangement so that they would have the possibility of repossessing the station in the event the payments were not made.

11. As we have stated in the Preliminary Statement to the Exceptions, the Bureau recognizes that a close question is presented on the strike application issue. However, as has been indicated above, it is clear from paragraph 49 of the Initial Decision that, in concluding that Paxton participated in a strike application, the Initial Decision relied heavily on two findings which are not supported by the record; First, that Paxton recruited Bryant as an applicant by means of Edwards; and second, that Paxton participated in the preparation of Bryant's application. Paragraph 46 of the Initial Decision makes clear that the Examiner meant by the latter clause that Paxton "was present at and assisted in the drafting of the application." (See paragraphs 3 and 5, above.) Had the Examiner not made these particular findings with respect to the "strike" application issue and still decided adversely to WWIT on this issue, the Bureau would not have taken exception to the conclusion because of the weight which properly should be given to the judgment of the Presiding Officer, provided it finds factual support in the record. However, because of the Initial Decision's stated, but unwarranted,

reliance on these two findings, it is not clear whether the Examiner's ultimate conclusion on the "strike" application issue rested primarily on his findings that Paxton was responsible for "engendering" Bryant's interest in filing an application and "assisted in the drafting" of the application or whether the Examiner would have arrived at the same conclusion based upon the following record facts:

(a) The principals of WWIT had a motive for wanting to see the Pressley application blocked, delayed, or defeated, and had taken certain preliminary steps to explore how this might be accomplished.

(b) They were aware that the filing of Bryant's application on or before April 29, 1960, the cut-off date, would, at a minimum, forestall inauguration of competitive service in Canton, North Carolina.

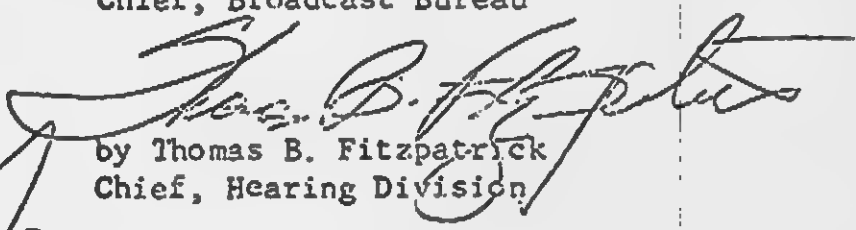
(c) Nothing Paxton said or did after he learned that Bryant was interested in filing an application was calculated to discourage Bryant from filing his application before the cut-off date.

(d) Several of his actions amounted to active encouragement. For example, he rearranged WWIT's announcers' schedule to permit Slatkin to assist Bryant with the preparation of the application and accompanied Bryant on two occasions when Bryant went to Washington to confer with his engineer and attorney in connection with the preparation and filing of the application.

These facts of record and the inferences which can reasonably be drawn from them could support the conclusion that

these activities on Paxton's part rendered the Bryant application a strike application, although it is by no means a clear cut question.

Respectfully submitted,
George S. Smith
Chief, Broadcast Bureau


by Thomas B. Fitzpatrick
Chief, Hearing Division


John F. Reilly
Attorney
Federal Communications Commission

September 17, 1968

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EXCEPTIONS OF WESTERN NORTH CAROLINA BROADCASTERS, INC.

Pursuant to the provisions of Sections 1.276 and 1.277(a) of the Commission Rules and Regulations, Western North Carolina Broadcasters, Inc., by its attorneys, herewith respectfully submits its Exceptions to the Initial Decision (FCC 68 D-37) which recommended denial of the above-captioned application for renewal of license, and respectfully requests that said Exceptions be granted.

Oral argument is respectfully requested on these Exceptions in accordance with the provisions of Section 1.277 (c) of the Commission Rules.

Exceptions To Preliminary Statement

Exception No. 1: To the failure of the Hearing Examiner to find, in the Preliminary Statement, that the above-captioned application of Western North Carolina Broadcasters, Inc., for renewal of license of Radio Station WWIT, Canton, North Carolina, was filed with the Commission on September 1, 1960. (Official notice requested).

Exception No. 2: To the failure of the Hearing Examiner to find, in the Preliminary Statement, that by Memorandum Opinion and Order (FCC 66-1147) of the Commission released January 4, 1967, it was indicated that the above-captioned application was designated for evidentiary hearing as a consequence of a Petition To Deny or designate for hearing application for renewal of Station WWIT license filed on July 7, 1965, by Vernon E. Pressley, licensee of Station WPTO, Canton, North Carolina (official notice requested).

Exception No. 3: To the failure of the Hearing Examiner to find as follows in Paragraph 1 of the Preliminary Statement, with reference to an Initial Decision issued by Hearing Examiner Thomas H. Donahue, adopted October 8, 1962, in the matter of Vernon E. Pressley, 33 FCC 838:

"At the time the above-captioned application for renewal of license of WWIT was filed with the Commission, there were pending before the Commission two applications for new stations to operate daytime only on 920 kilocycles, one by Vernon E. Pressley for a second station at Canton, North Carolina (File No. BP-12872) and an-

other by Billy E. Bryant for a fifth station at Asheville, North Carolina, some 18 miles east of Canton (File No. BP-14104). The population of Canton was 5,068 in 1960 and the population of Asheville was 60,192 (U.S. Census). The Pressley and Bryant applications were mutually exclusive with each other but not with the WWIT renewal application. Prior to the start of the consolidated hearing required on the Pressley and Bryant applications, Pressley charged that Bryant's application had not be filed in good faith but for the purpose of delaying and preventing the establishment of a second station at Canton which would compete with WWIT. In support, Pressley charged Western North Carolina and its General Manager, Dalton R. Paxton, with providing improper assistance to Bryant. Before the actual hearing began, Bryant dismissed his application. The hearing was held in December, 1961 and January 1962 on Pressley's application and on an application to increase the power of Co-Channel Station WTCW, Whiteburg, Kentucky (File No. BP-13526). One of the issues was whether Pressley had submitted false affidavits in support of his charges against Bryant. Although neither Western North Carolina nor any of its principals were named as parties to the hearing, two of its principals, Paxton and Sidney A. Watts, were subpoenaed by and testified as witnesses for the Commission's Broadcast Bureau. Although the issue against Pressley had been added against Bryant's request, Bryant was not called as a witness. Because neither they nor Western North Carolina were parties to the hearing, no counsel entered an appearance for Paxton and Watts, and there was no one to object to questions to them or to develop clarifying testimony from them. The Initial Decision of Examiner Donahue proposing to grant the Pressley and WTCW applications, released October 9, 1962, contained findings of fact which reflected adversely upon Paxton and Watts. Because neither they nor Western North Carolina were parties to the proceeding, they could not file

Exceptions, and the Initial Decision became final automatically on November 28, 1962. See Vernon E. Pressley, 33 FCC 838. Station WPTL has been operating daytime only since August, 1963 on the frequency of 920 kilocycles with a power of 500 watts.

Exception To Commission Ruling

Exception No. 4: To the Memorandum Opinion and Order (FCC 67-547), released May 16, 1967, which denied applicant's Petition For Reconsideration of the Commission Order Of Designation. The applicant contends that the Commission, without justification, allowed more than six years to elapse prior to issuance of the Memorandum Opinion and Order which designated the above-captioned renewal application for evidentiary hearing. The inexcusable delay of the Commission in issuing its hearing designation Order, more than six and one-half years after the filing of the above-captioned renewal application, has effectively deprived the applicant of his legal right, guaranteed by the Constitution and Court precedent, to preparation of a defense against the serious allegations made with respect to the applicant's character qualifications.

Exceptions To Finding Of Fact

Exception No. 5: To the failure of the Hearing Examiner to make the following additional findings of fact in Paragraph 6:

Each of the three transferees who testified in this proceeding, Sidney A. Watts, Paxton and Mrs. Freda Burress, said that he or she understood that at the time of the negotiations, a consulting agreement would be part of the overall transaction and approved of the plan for Middleton and Edney to lend advice because none of the transferees had experience in managing a broadcast station (Tr. 70-75; Tr. 78-80; Tr. 779-780; Tr. 906-908).

Exception No. 6: To the failure of the Examiner to make the following additional findings of fact in Paragraph 6:

In February 1959, Freda H. Burress sold her shares to Sidney A. Watts, W. Barry Medlin, Jr., sold his shares to Dalton R. Paxton and David R. Riley sold his shares to Robert H. Owen. The stockholders now are Sidney A. Watts, 34.38%; Dalton R. Paxton, 33.81%; Boice M. Watts, 15.19%; Dr. Robert H. Owen, 15.19% and Champion Paper and Fibre Co., 1.43%. (WWIT Ex. No. 17)

Exception No. 7: To the failure of the Hearing Examiner to make the following additional findings of fact in Paragraph 6:

At the time of purchase, Paxton understood he was personally obligating himself to pay for the stock under the first contract only and that payments under the second contract were the obligation of the corporation and were to be made out of corporate revenues. Watts and Paxton did not discuss the consulting agreement prior to the purchase of the stock. Watts thought the consulting

agreement was probably a common procedure and thought it was a "good deal" because it would give them the benefit of some firsthand experience in running a radio station. The possible tax consequences of the two contract arrangements were not explained to Watts. Freda Burress explained that they, the buyers, had not had a lot of experience in managing a station and felt they could use Middleton's and Edney's services in helping them manage the station (Tr. 79, 766, 780-781, 857).

Exception No. 8: To the failure of the Hearing Examiner to make the following additional findings of fact in Paragraph 7:

- . The agreement was not filed with the Commission until November 12, 1962, after the hearing on the Pressley application, at which time the original consulting agreement was also filed. The text of the letter of transmittal reads as follows:

"We enclose herewith a copy of an agreement entered into late in December 1958 by Western North Carolina Broadcasters, Inc., and B. M. Middleton and Kermit Edney, also a copy of an agreement executed in May 1960 by the same parties in compromise of the preceding arrangement. This arrangement provides for the payment of certain sums to Messrs. Middleton and Edney for a period of five years, beginning January 1, 1959, for services to be rendered to the corporation in a con-

sulting capacity to the extent that they may be called upon.

"The agreement was not entered into at the time of the transfer of control agreement whereby Messrs. Middleton and Edney sold their stock in this corporation. It was apparently for that reason that it was not filed with that application, BTC-2951, which was granted in November 1958.

"However, as the undersigned testified in the proceeding upon the Pressley application, Docket No. 14,007, the consulting agreement was contemplated when the stock purchase agreement was executed and so should probably have been considered a part of the purchase price. In fact, our Washington counsel advises that its terms, if known, should have been reduced to writing and submitted as an exhibit with the application. The enclosed documents were furnished and were made part of the record as F.C.C. Exhibits 4 and 6, respectively.

"In the Initial Decision of Examiner Donahue released on October 9, he made particular reference of the fact that these documents had never been filed. Inasmuch as he apparently believes that they should now be on file even though they had not been submitted with the transfer application, and even though they were actually a part of the Com-

mission's records in the Pressley proceeding, the enclosed are submitted to be associated with the transfer application or to be handled in such manner as the Commission may consider appropriate.

"There is certainly nothing secret about these documents, as was indicated by the readiness of the undersigned to discuss them and to make them available. We did not consider the consulting arrangement to be a management consulting agreement within the contemplation of Rule 1.342 (f)(1) because it was not contemplated that any consultation would relate to the actual management of the station, but primarily to programming and to promotional ideas and then only when requested. Certainly the arrangement did not provide that Messrs. Middleton and Edney would participate in the profits or share in the losses of Station WWIT.

"We regret if we have been in error in our interpretation of our obligation under your Rules."

The foregoing was admitted for the limited purpose of showing the fact that the contracts were ultimately filed with the Commission as well as the representations made by the licensee in connection therewith, but not to establish the truth of the various assertions. The transmittal letter was drafted by the late Eliot Lovett, Washington communications counsel for Western North Carolina Broadcasters, Inc., and retyped and signed by Watts (WWIT Ex. No. 10-A; Tr. 1041).

Exception No. 9: To the failure of the Hearing

Examiner to make the following additional findings of fact in Paragraph 8:

The application for transfer of control was signed by Middleton on behalf of the transferors and Medlin on behalf of the transferees. Prior to completion and filing of the application, all of which was completed by October 30, 1958, drafts of the stock sale and consulting agreements, as prepared by North Carolina counsel, were submitted to the late Eliot C. Lovett for review (Tr. 140-141, 704-705, 780-781, 809-810, 832, 987; WWIT Ex. No. 17). By letter of October 7, 1958, Lovett returned the drafts of both the agreements to Middleton with his comments and suggestions (WWIT Ex. No. 14).

Exception No. 10: To the failure of the Hearing

Examiner to make the following additional finding in Paragraph 8:

The applicant presented as an expert witness Mr. Scott P. Crampton, a Washington attorney whose qualifications as a tax expert were unquestioned (Tr. 1442). In preparation for his testimony, Mr. Crampton reviewed the Commission Order of hearing designation, Proposed Finding of Fact and Conclusions of Law submitted on behalf of the applicant, a Memorandum Opinion and Order of the Hearing Examiner (FCC 68M-453, released March 18, 1968), which raised question as to whether the purported failure of the licensee of WWIT to file the so-called consulting agreement at issue might have been motivated by tax considerations (Tr. 1444). Mr. Crampton reviewed the applicant's North Carolina income tax returns for the

fiscal year ended July 31, 1960; July 31, 1961; July 31, 1962; July 31, 1963; and July 31, 1964. He also reviewed the applicant's United States Corporation Income Tax for the fiscal year ended July 31, 1961; July 31, 1962; July 31, 1963; and July 31, 1964 (Tr. 1444-1445). On the basis of materials made available by the Internal Revenue Service, it appears that the consulting arrangement referred to was reflected as an operating expense for the fiscal years ending July 31, 1961, July 31, 1962, and July 31, 1963 (Tr. 1445-1446). Mr. Crampton concluded that there was adequate disclosure of these amounts as being paid as consultant fees and that the amounts were substantial with respect to the net income reported in these years and that it might be an item which would have been investigated upon examination of the return (Tr. 1446). Mr. Crampton reviewed as well the representations in the record with respect to tax returns of Mr. Beverly Middleton (WWIT Exhibit No. 19), wherein Mr. Middleton considered the income under the consulting agreement to be ordinary income for tax purposes. Mr. Crampton further testified that the accounting practice followed by the applicant was compatible with the accounting and reporting practice used by Mr. Middleton in respect to payments under the consulting agreement (Tr. 1447). He also testified that based upon a study of the materials furnished to him he saw no reason why the parties to the consulting agreement would not have disclosed the consulting agreement to the Federal Communications Commission because, in his opinion, they adequately disclosed what was being done to the Commissioner of Internal Revenue in their tax returns (Tr. 1447). In substance, then, Mr. Crampton concluded that he could not conceive of any reason, from a tax standpoint, why the stockholders of the applicant would have wanted to conceal the consulting agreement from any branch of the federal govern-

ment and that, in fact, they had disclosed the consulting agreement to the tax branch of the government by the two words "Consultants' Fees", and in relation to the size of the amount of the consulting fees to their income and other expenses (Tr. 1449). He testified that if there was some reason for the consulting agreement, such as lack of experience in the operation of a broadcast station on the part of the stock purchasers and experience in operation on the part of the sellers of the stock, that would, in his opinion, be a legitimate reason for entering into a consulting agreement (Tr. 1451-1452). Mr. Crampton testified that if services had actually been rendered under the consulting agreement, this would certainly add strength to the position taken that it was, in fact, a consulting agreement and not a disguised capital expenditure (Tr. 1452). He concluded that while he did not know what the parties might have intended or even what the facts of the actual agreement were there was a full disclosure, and that if anybody from the Internal Revenue Service wanted to take a different position about this matter, they at least were told about the situation (Tr. 1452).

Exception No. 11: To the failure of the Hearing Examiner to make the following additional findings of fact in Paragraph 8:

The record contains no testimony that any of the transferees who are now stockholders of Western North Carolina saw the complete application, or even the transferees' portion, before it was filed with the Commission. No evidence was offered in this hearing to show in the Pressley hearing (Docket No.

14007) any evasion of questions concerning the agreement.

Exception No. 12: To the failure of the Hearing Examiner to make the following additional findings of fact in Paragraph 8:

Paragraph 2b, Section I of the Transferors' portion of the application for transfer of control (FCC Form 315), states:

"If the transfer of control proposed in the application arises out of a contract with the transferee, attach the contract hereto as 'an exhibit'". In response thereto, the transferors submitted a copy of the stock sale agreement.

Exception No. 13: To the failure of the Hearing Examiner to make the following additional finding in Paragraph 8:

Paragraph 2c, Section I of FCC Form 315 requires a "Yes" or "No" answer to the following question: "Is this the only contract or agreement?" If the answer is "No", the transferor is directed to "reduce to writing if not already in the written form and submit . . . such other agreements or understandings as there may be as an exhibit. The response of the transferors to Paragraph 2c was "Yes", and no further response was given.—

Exception No. 14: Paragraph 22 of Section II of the transferees' portion of the application is headed "Ownership

and Control of Station" and begins with the following explanation:

'22. The Commission is seeking in this paragraph information as to contracts and agreements now in existence, as well as arrangements or negotiations, written or oral, which relate to the present or future ownership, control or operation of the station; the question must be answered in the light of this instruction.' Paragraph 22(a) requires a check mark as to whether "applicant's control of the station is to be by reason of" ownership, lease or other authority. In response, the transferees added the word "Stock" before "ownership" and placed a check mark after "ownership". Paragraph 22(b) requires the "name and address of the owner of the station (if other than the applicant)". In response, the transferees' stated "Not Applicable". Paragraph 22(c) asks "Will the applicant have and maintain absolute control of the station, its equipment, and operation including complete supervision of the programs to be broadcast? If 'No' explain". The transferees gave a check mark following "Yes". Paragraph 22(d) asks "Are there any documents, instruments, contracts, or understandings relating to ownership, management, use or control of the station or facilities, or any right or interest therein (Emphasis Supplied). If so, attach as Exhibit No. ____ copies of all such documents, instruments, or contracts and state the substance of oral contracts or understandings." The transferees gave a check mark following "No".

Exception No. 15: To the failure of the Hearing Examiner to make the following additional finding of fact in Paragraph 8:

No question or instruction of FCC Form 315 refers to the "total consideration" for a proposed transfer of control (Tr. 1084-1086).

Exception No. 16: Section 1.342 of the Commission Rules and Regulations, which was in effect in 1958 with respect to the filing of contracts, reads as follows:

"Each licensee or permittee of a standard, FM, television, or international broadcast station (as defined in Part 73 of this chapter), whether operating or intending to operate on a commercial or noncommercial basis, shall file with the Commission copies of the following contracts, instruments, and documents together with amendments, supplements, and cancellations, within 30 days of execution thereof. The substance of oral contracts shall be reported in writing.

(a) Contracts relating to network service: All network affiliation contracts, agreements, or understandings between a station and a national, regional, or other network shall be filed. Transcription agreements or contracts for the supplying of film for television stations which specify option time must be filed. This section does not require the filing of transcription agreements or contracts for the supplying of film for television stations which do not specify option time, nor contracts granting the right to broadcast music such as ASCAP, BMI, or SESAC agreements.

(b) Contracts relating to ownership or control: Contracts, instruments, or documents relating to the present or future ownership or control of the licensee or permittee or of the licensee's or permittee's stock, right, or interests therein, or relating to changes in such ownership or control. This

paragraph shall include but is not limited to the following:

(1) Articles of partnership, association, and incorporation; and changes in such instruments;

(2) Bylaws, and any instrument effecting changes in such bylaws;

(3) Any agreement, document, or instrument (i) providing for the assignment of a license or permit or (ii) affecting, directly or indirectly, the ownership or voting rights of the licensee's or permittee's stock (common or preferred, voting or non-voting), such as: (a) Agreements for transfer of stock; (b) Instruments for the issuance of new stock; or (c) Agreements for the acquisition of licensee's or permittee's stock by the issuing licensee or permittee corporation. Pledges, trust agreements, options to purchase stock and other executory agreements are required to be filed.

(4) Proxies with respect to the licensee's or permittee's stock running for a period in excess of one year; and all proxies, whether or not running for a period of one year, given without full and detailed instructions binding the nominee to act in a specified manner. With respect to proxies given without full and detailed instructions, a statement showing the number of such proxies, by whom given and received, and the percentage of outstanding stock represented by each proxy shall be submitted by the licensee or permittee within 30 days after the stockholders' meeting in which the stock covered by such proxies has been voted; Provided, however, That when the licensee or permittee is a corporation having more than 50 stockholders, such complete infor-

mation need be filed only with respect to proxies given by stockholders who are officers or directors, or who have 1 percent or more of the corporation's voting stock; in cases where the licensee or permittee is a corporation having more than 50 stockholders and the stockholders giving the proxies are neither officers or directors nor hold 1 percent or more of the corporation's stock, the only information required to be filed is the name of any person voting 1 percent or more of the stock by proxy, the number of shares voted by proxy by such person, and the total number of shares voted at the particular stockholders' meeting in which the shares were voted by proxy;

(5) Mortgage or loan agreements containing provisions restricting the licensee's or permittee's freedom of operation, such as those affecting voting rights, specifying or limiting the amount of dividends payable, the purchase of new equipment, the maintenance of current assets, etc.; or

(6) Any agreement reflecting a change in the officers, directors, or stockholders of a corporation, other than the licensee or permittee, having an interest, direct or indirect, in the licensee or permittee as specified by §1.615

(c) Contracts relating to the sale of broadcast time to "time brokers" for resale.

(d) Contracts relating to Subsidiary Communications Authorization Operation, except contracts granting licensees or permittees engaged in SCA the right to broadcast copyright music.

(e) Time sales contracts:
Time sales contracts with the same

sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs, and special events) broadcast pursuant to the contract is not under control of the station.

(f) Contracts relating to personnel:

(1) The following contracts, agreements, or understandings shall be filed: management consultant agreements with independent contractors, contracts relating to the utilization in a management capacity of any person other than an officer, director, or regular employee of the licensee or permittee station; management contracts with any persons, whether or not officers, directors, or regular employees, which provide for both a percentage of profits and a sharing in losses; or any similar agreements.

(2) The following contracts, agreements, or understandings need not be filed: agreements with persons regularly employed as general or station managers or salesmen; contracts with program managers or program personnel; contracts with chief engineers or other engineering personnel except those contracts required to be filed under the provisions of §§ 73.93(c), 73.265(c), and 75.565(c) of this chapter; contracts with attorneys, accountants, or consulting radio engineers; contracts with performers; contracts with station representatives; contracts with labor unions; or any similar agreements.

Exception No. 17: To the failure of the Hearing Examiner to make the following additional findings in Paragraph 8:

Assuming that the substance of the informal plan to enter into the consulting agreement should have been reported in the transfer of control application, the record of this hearing contains no explanation as to why the plan was not reported. Both the transferors and transferees were represented by experienced communications counsel who knew prior to the time the application was completed of the plan to enter into the consulting agreement. That he knew of the contents of the application as finally prepared must be presumed, not only because he had commented upon the draft of portions of it but also because he had filed it with the Commission (WWIT Exhibit No. 15, WWIT Exhibit No. 16). There appears to be no reason why the plan was not disclosed other than that counsel believed it was not necessary to do so. This is supported by the fact that the plan had no bearing upon the transferees' financial qualifications, because the payments under the consulting agreement were to be made by cash generated from the operation of the station and were not to be guaranteed by any of the individual transferees. Most unfortunately, the one person who might have shed some light on the question of why the plan to enter into the consulting agreement was not disclosed in the application, the Washington communications attorney, passed away in October, 1963 (WWIT Exhibit No. 14). The fact that a copy of the consulting agreement was not filed formally with the Commission until November 1962, coupled with the fact that the

transfer of control application contained no reference of the plan to enter into the agreement, supports the finding that counsel believed that filing of the agreement was not required by provisions of the then applicable Section 1.342 of the Commission Rules.

Exception No. 18: To the findings in Footnote 6 of Paragraph 14 as irrelevant.

Exception No. 19: To the finding of the last sentence in Footnote 7 of Paragraph 15 as irrelevant, conclusionary, and not supported by the record.

Exception No. 20: To the failure to make the following additional findings of fact in Paragraph 17:

At the meeting on April 26, Sharpe, a former Commission employee, knowing that Paxton was associated with WWIT at nearby Canton, asked a series of questions to make certain in his own mind and to his own satisfaction that Paxton would not have an interest in the station and that Bryant would be the sole owner before he (Sharpe) agreed to undertake the work (Tr. 1002-1005, 1026-1037).

Exception No. 21: To the finding in Footnote 8 of Paragraph 17 that Paxton "possibly" accompanied Edwards and Bryant sometime between April 23 and April 25, 1960, for the purpose of selecting a transmitter site, as speculative.

Exception No. 22: To the failure to make the following additional findings of fact in Paragraph 17:

Sharpe said that in preparing the Bryant application, he used Pressley's application for comparative purposes and felt that he had come up with an improvement by specifying 1 KW instead of the 500 watts which had been specified by Pressley, and by serving a larger number of people within the pertinent contours. One of the reasons Sharpe did not suggest the use of another frequency was that an application for 920 kilocycles could be processed very promptly if filed by April 29. This was one of the strategies of engineers at that time, to attempt to file applications on or close to cut-off dates because it would save some 14 month's processing time. He did not explain this to Bryant because he believed that Bryant had the impression that he would have a distinct advantage by filing at that time in that he would have come the owner of a station in Asheville. Had Bryant been less interested, Sharpe might have explained the advantage to him (Tr. 165, 1009-1010, 1022-1023).

Exception No. 23: To the failure to find in Paragraph 22 that dismissal of Bryant's application was motivated in part by the designation of an engineering issue against his application. By letter of October 14, 1960, pursuant to Section 309(b) of the Communications Act of 1934, as amended, the Commission had advised the three applicants subsequently designated in the Pressley proceeding that consolidated hearings appeared to be necessary on their applications. With respect to the Bryant application, the Commission questioned the possibility of inter-

action between Bryant's proposed antenna system and that of WWIT because of their proximity (WWIT Exhibit No. 18, p. 2). ^{1/}

Exception No. 24: To the failure to make the following additional findings of fact in Paragraph 25:

On April 27, 1960, Paxton wrote a check on WWIT's account in the amount of \$500 payable to himself. He signed it and took it to Sidney Watts for signature, telling him it was for expenses. He obtained Watts' signature because Mrs. Freda Burress, the bookkeeper, was on vacation. Paxton's signature alone would have been sufficient. The check was in partial reimbursement for business expenses he had incurred. He made the check out for \$500 because that was the amount he needed to buy the oil lease from Bryant (Tr. 67, 90, 97, 793, 947, 956; Pressley Exhibit No. 9).

Paxton went to Bryant's home to complete the transaction and left with Bryant to get the oil lease notarized at an automobile agency on Haywood Street. Paxton endorsed the check over to Bryant (Tr. 940, 941, 944, 945; Pressley Exhibit No. 9, Pressley Exhibit No. 10). Paxton was reimbursed by WWIT for whatever expenses he incurred in his day-to-day activities pertaining to the station. These include automobile expenses, including a proportionate share of insurance and depreciation, food, lodging, entertainment - for whatever he spent money. The records of WWIT reflect that it reimbursed expenses to Paxton in the total amount of \$1,322.75 for 1960, \$1,385.80 for 1961 and \$1,572.85 for 1962. (Tr. 950, 951; WWIT Exhibit No. 11).

^{1/} Bryant's transmitter site difficulties were such that it would have cost him \$20,000 - \$30,000 for levelling of his transmitter site (Tr. 186-187).

Exception No. 25: To the findings of fact in Foot-note 11 of Paragraph 26, as unsupported by the record evidence as a whole. The following findings should have been made:

On Sunday, May 1, Paxton gave Slatkin a check drawn on WWIT's account for \$50 in payment of Slatkin's services in connection with the preparation of an all-day music format for WWIT. The basic format, "Tempo", of which Slatkin still has the original copy, had been used at Station WLTC prior to that time and is presently used at Station WLOS. Slatkin also used it at Station WBMT. Paxton was interested in "Tempo" because he had seen stations with block programming in previously one-station markets have difficulty when a second station entered the market. Therefore, he wanted a little more modern sound to keep listeners. WWIT put the Tempo format into effect in September, 1960, and although there have been changes, the same general format is used today. Others at WWIT worked on the development of the music format and were not given extra compensation, but the idea was Slatkin's. However, no one at the station other than Slatkin had prior experience with "Tempo" or an all-music format and Slatkin was the only one to prepare written material (Tr. 1080). Slatkin was just filling in at WWIT and worked at a very low salary, \$60 per week, while waiting for his grant at Black Mountain, so it was decided he should be paid extra for this (Tr. 101-102, 317-318, 989-990, 1062-1065, 1076; WWIT Exhibit No. 1, Pressley Exhibit No. 1, Pressley Exhibit No. 11).

Exception No. 26: To the failure to find in Paragraph 29 that Edwards testified that he may have been in contact with Palmer Greer, the WWIT consulting engineer, in late 1959 or early 1960 as to frequencies available in the Asheville area, and that Greer had told him that 920 kilocycles, the frequency later specified by Bryant, was available (Tr. 1216-1217).

Exception No. 27: To the finding in the second sentence of Paragraph 30 insofar as it implies that Paxton and Bryant did not meet until after April 20, 1960, as not supported by the record evidence as a whole. The following findings should have been made:

A recurrent theme of Edwards was that Bryant and Paxton were total strangers and that he was responsible for initially introducing one to the other. No less than seven times during his testimony did Edwards assert that Paxton and Bryant did not know each other until he introduced them some time after the April 20 rally (Tr. 1168, 1171, 1248, 1257-1259, 1276, 1295). It is clear from the records that Paxton and Bryant had known one another since 1956 or 1957, when they were both living in Asheville and were social acquaintances who met casually over coffee approximately once a week. (Tr. 155, 872-873, 1339).

Exception No. 28: To the failure to make the following additional finding of fact after the second sentence of Paragraph 43:

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Watts testified that he discovered that Pressley had an outstanding debt on a thirteen year old note which Pressley had not disclosed as a liability in making financial representations to the Commission. Watts attempted to buy up the note in the hopes of making representations to the Commission that Pressley had not made a full and complete disclosure of his financial status to the Commission (Tr. 732-734).

Exception No. 29: To the finding in Paragraph 43 that Western North Carolina bought and paid for an interference chart on Pressley's application insofar as it is stated that WWIT's principals had no conceivable use other than to attempt to embroil Pressley's application in litigation before the Commission, as unsupported by the record, conclusionary, and contrary to common experience in competitive broadcasting.

Exception No. 30: To the findings in Paragraph 44 insofar as it is stated that Edwards gave the impression that if he could find the suitable party to file an application in conflict with Pressley's, Paxton would suitably reward him, as unsupported by the record. This finding by the Examiner is plainly inconsistent with the earlier finding that the testimony of Edwards is false in vital areas, that Edwards has forfeited the right to be believed, and that no portion of the Examiner's Initial Decision is based on the statements of Edwards (See Initial Decision, Para. 41)."

Exception No. 31: To the finding in Footnote 20 of Paragraph 44 insofar as it concludes that Paxton induced Edwards to find a suitable party to file an application in conflict with Pressley, probably through contribution by Paxton in some amount towards an ownership interest by Edwards, as not supported by the record. It is obvious that Paxton could not have made any appreciable financial commitment towards an ownership interest, either direct or indirect, in the Bryant proposal. The record shows that Paxton's annual salary was \$7,600 a year (Tr. 796). It is plain that he did not have the financial resources to make appreciable contribution to direct or indirect ownership interest in a "blocking" application.

Exception No. 32: To the finding in the first sentence of Paragraph 45 insofar as there is conjecture as to whether Bryant and Paxton were known to each other prior to April 20, 1960, as unsupported by the record. See, in this connection, Exception 27, supra.

Exception No. 33: To the inference of the Examiner that Paxton paid Bryant \$500 on April 27, 1960, for the purpose of enabling Bryant to defray the \$500 engineering retainer charge by Sharpe, as not supported by the evidence. See, in this connection, the record citations to Exception No. 24, supra. The evidence is uncontradicted that Paxton received from Bryant that day in return for the payment a document assigning

to him an undivided one-thirtysecond interest in a gas and oil lease in Green County, Kentucky. At that time, Paxton considered it to be a sound speculative investment (Pressley Exhibit No. 10, Tr. 175-178, 180-181, 188, 938-947, 956, 976). At that time, Bryant was a promoter of oil leases (Tr. 1399). At the time he was preparing his application, he discussed his business with different people relative to drilling and exploration for oil (Tr. 169-170, 176). There was no evidence offered in an attempt to prove that Bryant actually needed the \$500 for payment of expenses incurred in the preparation of his application. No findings or conclusions adverse to the applicant or to any of its principals can be drawn from that transaction. In addition, the record fails to establish any payments by Western North Carolina to or on behalf of Bryant for any purpose whatsoever.

Exceptions To Conclusions Of Law

.. Exception No. 34: To the conclusion in Paragraph 49 that Paxton recruited Bryant as an applicant through the agency of Hal Edwards as contrary to the record evidence. The Examiner should have concluded that Edwards already knew about the availability of 920 kilocycles for Asheville, and that he recruited Bryant.

Exception No. 35: To the conclusion in Paragraph 49 that Paxton provided the cash by which Bryant met his initial expense as an applicant as contrary to the record.

Exception No. 36: To the conclusion that Paxton made available to Bryant the technical knowledge of WWIT's employees. The only employee of WWIT used by Bryant was a part-time announcer at WWIT, Eugene Slatkin, who had been known to Bryant for many years prior to Bryant's acquaintance with Paxton. The record shows that Bryant contacted Slatkin and that Slatkin agreed to change his working hours at WWIT so as to be available to help prepare the programming portion of the Bryant application. It was not an unusual practice for employees at WWIT to swap shifts. (Tr. 964, 969-973, 988)

Exception No. 37: To the conclusions in Paragraphs 50 and 51 insofar as it is concluded that Paxton's participation in the Bryant application was motivated by a desire to obstruct or delay the grant of the Pressley application in such a manner as to disqualify the applicant herein.

Exception No. 38: To the conclusion in Paragraph 52 that the failure to report to the Commission the so-called "consultant agreement" was a subterfuge as not supported by probative evidence.

Exception No. 39: To the conclusions in Paragraphs 53 through 57 insofar as it is determined that principals of Western North Carolina knowingly and wilfully misrepresented to the Commission the true consideration paid by them to acquire control of the corporation because of tax advantages attendant to such a procedure. This erroneous conclusion assumes a level of sophistication in tax matters which cannot be attributed to the principals of Western North Carolina.

Exception No. 40: To the conclusion in Paragraph 58 that the Commission has presupposed that the applicant was required to file a copy of the consulting agreement at the time it was executed. The record evidence shows that there is uncertainty as to whether the filing of such an agreement is required by the Rules.

Exception No. 41: To the conclusion that Dalton Paxton participated in a strike application designed to block or impede the advent of competition in Canton, and to the conclusion that principals of Western North Carolina knowingly misrepresented to the Commission the true consideration which they paid for acquisition of a controlling interest in WWIT, as not supported by the record and contrary to law.

Exception No. 42: To the conclusion of Paragraph 61 insofar as it is determined that Dalton Paxton abused

policy, precedent, and applicable statute, for the reasons stated in these Exceptions and accompanying Brief.

Respectfully submitted,

/s/ Lee G. Lovett

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/s/ Joseph F. Hennessey
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September 24, 1968.

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

DECISION

Adopted: October 15, 1969 ; Released: October 20, 1969

Commissioner Robert E. Lee for the Commission: Commissioners Bartley, Wadsworth and Johnson not participating; Commissioner H. Rex Lee concurring in the result.

1. In the latter part of 1958, control of Western North Carolina Broadcasters, Inc. (WNIT), the licensee of standard broadcast Station WNIT, Canton, North Carolina was transferred, with Commission approval, to a group which included Dalton Paxton and Sidney Watts.

2. In 1961 we designated for hearing three applications to operate on 920 kHz: one in Canton, North Carolina, one in Whitesburg, Kentucky, and one in Asheville, North Carolina. At the request of Vernon E. Pressley, who was applying for Canton, we enlarged the issues to determine, inter alia, whether the application of E. E. Bryant for Asheville was filed in good faith or was filed solely or in part as a "strike" or to block the application of Vernon E. Pressley. At the request of Bryant, an issue was also added to determine whether Vernon E. Pressley's motion to enlarge issues had a proper basis in fact. On September 15, 1961, the Broadcast Bureau raised a substantial question concerning the validity of Bryant's engineering proposal. ^{1/} On October 9, 1961, Bryant requested dismissal of his application without prejudice,

^{1/} Official notice taken.

2

giving the engineering problem as the reason for the request. 2/ A few days thereafter the Chief Hearing Examiner dismissed the Bryant application with prejudice, thus rendering moot the "strike" issue. Examiner Thomas H. Donahue, in his Initial Decision, Vernon E. Pressley, et al., 33 FCC 838 (1962), 3/ concluded that Vernon E. Pressley submitted his motion to enlarge issues in good faith; that the Pressley application should be granted; and that the Whitesburg, Kentucky, application should also be granted. Both Dalton Paxton and Sidney Watts testified at the hearing in Vernon E. Pressley, et al., *supra*, but neither witness was represented by counsel during the course of the proceedings. Bryant was not called as a witness. Since no exceptions were filed, this Initial Decision became automatically effective on November 28, 1962.

3. On September 1, 1960, the licensee of Station WHIT submitted its application for renewal of license, which application was held in abeyance during the course of the Vernon E. Pressley, et al., hearing and for several years thereafter. Vernon E. Pressley, on July 7, 1965, filed a petition to deny or designate for hearing the WHIT renewal application. Finding that there existed, as a result of the record in the Vernon E. Pressley, et al., proceeding, substantial questions which related to the qualifications of the applicant to continue as a Commission licensee, by our order, FCC 66-1147, released January 4, 1967, we designated the WHIT renewal application for hearing. 4/ Vernon E. Pressley was made a party to the proceeding. The ultimate burden of proof was placed upon the applicant, although Pressley had the burden of proceeding with the introduction of evidence under Issues 1 through 4.

3

4. In his Initial Decision, FCC 68D-37, released May 17, 1968, Examiner Chester F. Maurowicz, Jr. concluded: (1) that one of WHIT's principals, Dalton R. Paxton, participated in a "strike" application designed to block or impede the advent of competition in Canton; (2) that, at the time the present principals acquired control of Station WHIT, the Commission was not told of a consulting agreement providing for payments which constituted part of the true consideration for the station; (3) that the applicant did not timely comply with a requirement for filing the consulting agreement; and (4) that grant of the application would therefore not serve the public interest.

2/ *Ibid.*

3/ The hearing was held in December, 1961, and in January and February, 1962.

4/ Issues were specified to determine: (1) whether the applicant participated in the Bryant application for the purpose of impeding grant of the Pressley application; (2) whether the applicant disclosed to the Commission the total consideration paid for transfer of control of the majority interest in its stock; (3) whether the applicant failed to file timely a consulting agreement to which it was a party; (4) whether any misrepresentations were made in the Vernon E. Pressley, et al., proceeding which can be imputed to the applicant; (5) whether the applicant is qualified to be a licensee; and (6) whether grant of the application would serve the public interest.

5. On June 30, 1969, we heard oral argument 5/ in this proceeding. We have considered the Initial Decision in light of the pleadings 6/ and oral argument, and we have decided to reverse the Initial Decision. We adopt those findings of fact in the Initial Decision which are not inconsistent with the modifications which we have made herein and in the appendix hereto.

The Alleged "Strike" Application

6. It seems clear that WWIT did not relish the prospect of competition from another station in Canton. Thus, Sidney Watts, a WWIT principal, attempted to purchase an outstanding note of Vernon Pressley with the thought that he might impair Pressley's financial qualifications before the Commission. Paxton testified that an interference study of Pressley's application showed interference to Station WTCW in Whitesburg, Kentucky; that he, Paxton, mentioned to an individual at WTCW the potential interference problem between that station and Pressley's proposal; and that Paxton told that individual that he would be glad to furnish any information which he could regarding Section 307(b). Paxton and Watts also discussed interference and Pressley's financial statement with the manager of another station.

7. Paxton accompanied Bryant to Washington, D.C. on two occasions when Bryant was engaged in activities preparatory to filing his application. However, Bryant paid for the transportation in connection with the two trips.

4 8. While Paxton gave Bryant a \$500 check on April 27, 1960, this was in payment for a mineral interest which he had purchased from Bryant, who was at the time a promoter of mineral interests. \$500 was the amount of the retainer fee required by Bryant's radio-engineer, Nugent Sharpe, but there is no indication that the mineral interest transaction took place to enable Bryant to pay the retainer. Furthermore, Nugent Sharpe ascertained, when Paxton and Bryant first called on him in Washington, that Paxton had no financial interest in the application and that Bryant intended in good faith to be the station owner. Thus, we do not agree with the Examiner's finding that Paxton provided the cash for Bryant to meet his initial expenses as an applicant.

9. Eugene Slatkin, an employee of WWIT, worked on Bryant's application on April 27, 1960, two days before it was filed. However,

5/ On July 8, 1969, WWIT filed a "Motion to Correct Transcript". Since no party has objected and since the request appears to be reasonable, the motion will be granted.

6/ Before us for consideration are: (a) Exceptions and supporting brief filed September 24, 1968, by Western North Carolina Broadcasters, Inc. (WWIT); (b) reply to WWIT's brief in support of exceptions, filed October 9, 1968, by the Broadcast Bureau; (c) exceptions and supporting brief filed September 17, 1968, by the Broadcast Bureau; and (d) reply to Broadcast Bureau's brief in support of exceptions, filed October 9, 1968, by Vernon E. Pressley.

this work was done by Slatkin at the specific request of Bryant, a prior acquaintance. Apparently Paxton's only part in this was his permitting Slatkin to trade time with another employee of Station WHIT in order for Slatkin to be free on April 27. No employee of WHIT other than Slatkin worked on the Bryant application. Slatkin received a \$50 check, dated April 30, 1960, from WHIT. There is evidence, however, that this was in payment for his work in connection with a new program format called "Tempo", which WHIT introduced to enhance its competitive position with regard to the new station which was expected in Canton, and that he was paid extra for this because he was working only temporarily at WHIT and at a low salary. On the basis of this record, we are not persuaded that Paxton instigated Bryant's license application. ^{7/} Rather, we find that Bryant, after he had decided to apply for the radio license, received a modicum of assistance from Paxton, a prior acquaintance.

10. In light of the evidence in this unusual case, we are not prepared to deny renewal of WHIT's license. Bryant appears to have been seriously interested in obtaining a license at Asheville, but he dismissed his application after the Broadcast Bureau raised a substantial question about the validity of his engineering proposal. Finally, we believe that Paxton's action, recognizing the potential advantage to WHIT of Bryant's application, is quite different from the act of instigating an application to compete with Pressley's application.

The Consulting Agreement

5 11. An application was filed on October 31, 1958, for transfer of control of WHIT from Beverly M. Middleton, Kermit Edney, and others to Dalton R. Paxton, Sidney A. Watts, W. Barry Medlin, Jr., and others. The consideration was listed as \$20,000 to be paid when the sale was consummated and an additional \$20,000 plus interest in monthly installments over five years. We granted the application on November 28, 1958. On December 22, 1958, the transfer of stock in WHIT was consummated, and a consulting contract was executed which provided: (1) that the corporation would employ Middleton and Edney to serve "in a consulting capacity to the extent that may be called on"; (2) that the emolument of \$1200 per month was to be paid for five years to them collectively, and in the event of the demise of either, to the survivor of them, and if both died, to the President of Radio Hendersonville, Inc.; and (3) that, if more than two consecutive payments should become in default, the entire balance would become due and payable. By a revision on May 31, 1960, the amount payable under the consulting agreement was reduced. Neither the consulting agreement nor its revision was filed with the Commission at the time of its execution, but a copy of the agreement was introduced in evidence on January 16, 1962, at the hearing in Vernon E. Pressley, et al., supra.

12. There was testimony in this proceeding that the consulting agreement was part of the purchase price and also that the transferees

^{7/} There is no support for the finding that Paxton recruited Bryant as an applicant by means of one A. Hal Edwards. In his testimony, Edwards suggested that this was the case, but the Examiner determined that Edwards was not a reliable witness, and we agree with this conclusion.

needed the advice of Middleton and Edney. Watts and Paxton did not discuss the consulting agreement prior to the purchase of the stock. Watts thought that the consulting agreement was probably a common procedure and that it was a "good deal" because it would give the purchasers the benefit of some firsthand experience in running a radio station. Watts was not aware of any tax advantages. Paxton's understanding was that he was obligated only under the stock purchase agreement and that additional payments were the obligation of the corporation. 8/ In the application for transfer of control the parties mentioned, and submitted as an exhibit, the stock transfer agreement, but no mention was made of the consulting agreement. The application for transfer of control was signed on behalf of the transferers by Beverly M. Middleton and on behalf of the transferees by W. Barry Medlin, Jr., who is no longer a WHIT stockholder. On the basis of a letter which purports to have been signed in his behalf on October 7, 1958, we believe that the deceased attorney, Mr. Eliot Lovett, knew, when he submitted the application for transfer of control to the Commission, that a consulting agreement was contemplated.

6

13. WHIT, by letter of November 12, 1962, 9/ transmitted the consulting agreement as amended to the Commission for filing, although it had previously been received in evidence in Vernon E. Pressley, et al., supra. The letter of transmittal, inter alia, stated: (1) that the consulting agreement was not entered into "at the time of the transfer of control agreement whereby Messrs. Middleton and Edney sold their stock in this corporation", (2) that apparently for this reason it was not filed with the application; (3) that the consulting agreement was contemplated when the stock purchase agreement was executed and so should probably have been considered part of the purchase price; and (4) that the parties did not consider the consulting arrangement to be a management consulting agreement within the provisions of Rule 1.342(f)(1) because it was not contemplated that any consultation would relate to the actual management of the station, but primarily to programming and to promotional ideas.

14. The consulting agreement was part of the purchase price. There is no satisfactory explanation as to why the consulting agreement was not filed with the transfer application. The consulting agreement had no bearing upon the transferees' financial qualifications because payments under the agreement were the obligation of the corporation and were not guaranteed by any of the individual transferees. While the Examiner found that the non-disclosure of the consulting agreement was motivated by a desire to obtain a tax advantage for WHIT, he did not make findings on the following significant testimony. Attorney Scott P.

8/ The consulting agreement gave the sellers the option of proceeding against the corporation rather than the individual purchasers in the event of non-payment. This would be a potential advantage in case of default.

9/ Counsel stipulated that this letter was drafted by Mr. Eliot Lovett and signed by Mr. Watts. The letter was admitted, not to establish the truth of the assertions contained therein, but simply to establish that it was filed.

Crampton, a tax specialist, testified at the hearing that there was an adequate disclosure of the consulting fees to the Internal Revenue Service and that he saw no motive from a tax standpoint for non-disclosure of the consulting agreement to the Federal Communications Commission. We thus conclude that WFIT had nothing to hide from the Commission; that it was not guilty of any misrepresentation; and that failure to file the agreement does not reflect adversely on the applicant's character qualifications. ^{10/} Accordingly, we are convinced that the Examiner's Initial Decision should be reversed and that WFIT's license should be renewed.

7

Participation in this Proceeding by Commissioner Cox

15. At oral argument counsel for WFIT noted during his rebuttal that Commissioner Cox was Chief of the Broadcast Bureau at the time Vernon E. Pressley, supra, was being litigated. Counsel, however, emphasized that he was not objecting to Commissioner Cox's participation. The Initial Decision in Vernon E. Pressley, supra, was admitted in this case only for the purpose of taking official notice thereof. We have not relied on it in deciding the issues of this case. Nevertheless, if counsel had raised the question of Commissioner Cox's participation immediately after this case was designated for hearing, Commissioner Cox could have withdrawn without disruption of the proceeding. However, considering the fact that the question was raised after the Commissioner had heard nearly all of the oral argument and that no party objects to his participation, we can find no prejudice to any of the parties as a result of his participation. Thus, we believe that Commissioner Cox can properly participate in the disposition of this case.

16. ACCORDINGLY, IT IS ORDERED that the application of Western North Carolina Broadcasters, Inc. for renewal of license of Station WFIT IS GRANTED.

17. IT IS FURTHER ORDERED that the "Motion to Correct Transcript" filed by Western North Carolina Broadcasters, Inc. on July 8, 1969, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

^{10/} In view of all of the foregoing, we are also persuaded that no showing has been made that Paxton or any other principal of WFIT made misrepresentations or concealed facts in the Vernon E. Pressley, et al., proceeding.

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

Exceptions of Western North Carolina Broadcasters, Inc.

<u>Exception No.</u>	<u>Ruling</u>
1, 2	<u>Granted</u> . See paragraph 3 of the <u>Decision</u> .
3	<u>Granted</u> in substance. See paragraph 2 of the <u>Decision</u> .
4	<u>Denied</u> , in view of the disposition of this case.
5, 7, 9	<u>Granted</u> . See paragraph 12 of the <u>Decision</u> .
6	<u>Granted</u> to the extent that W. Barry Medlin is no longer a stockholder of WMTT. See paragraph 12 of the <u>Decision</u> . In other respects <u>denied</u> as surplusage.
8	<u>Granted</u> . See paragraph 13 of the <u>Decision</u> .
10	<u>Granted</u> to the extent shown in paragraph 14 of the <u>Decision</u> . In other respects <u>denied</u> as surplusage.
11	<u>Denied</u> . The requested findings are not necessary to the proper disposition of this case.
12, 13, 14, 16, 29, 40	<u>Denied</u> for lack of decisional significance in view of our <u>Decision</u> herein.
15	<u>Denied</u> . Form 315 does require disclosure of the total consideration. (Official notice taken.)
17	<u>Granted</u> to the extent shown in paragraphs 12, 13, and 14 of the <u>Decision</u> .
18	<u>Granted</u> . See paragraph 9 of the <u>Decision</u> .
19	<u>Granted</u> . The last sentence in Footnote 7 of paragraph 15 of the Initial Decision is deleted as irrelevant.
20, 24, 33	<u>Granted</u> in substance. See paragraph 8 of the <u>Decision</u> .
21	<u>Granted</u> . The words "and possibly by Paxton" are deleted as speculative.
22	<u>Denied</u> . The requested findings lack decisional significance in view of our <u>Decision</u> herein.

- 23 . Granted in substance. See paragraphs 2 and 10 of the Decision.
- 25, 34 . Granted in part. See paragraph 9 of the Decision. In other respects denied for lack of decisional significance in view of our Decision herein.
- 26 . Denied. Cited evidence does not support the requested finding.
- 27, 30, 31, 32 . Granted in substance. See paragraph 9 of the Decision.
- 28 . Granted in substance. See paragraph 6 of the Decision.
- 35 . Granted. See paragraph 8 of the Decision.
- 36 . Granted. See paragraph 9 of the Decision.
- 37, 42 . Granted. See paragraphs 10 and 16 of the Decision.
- 38 . Granted. See paragraph 14 of the Decision.
- 39 . Granted in substance. See paragraph 14 of the Decision.
- 41 . Granted. See paragraphs 10 and 14 of the Decision.
- 43 . Granted in substance. See paragraph 14 of the Decision.
- 44 . Denied as being of no decisional significance.
- 45 . Granted. See paragraphs 5 and 16 of the Decision.

Exceptions of the Broadcast Bureau

- 1 2 Granted in substance. See paragraph 14 of the Decision.
- 2, 3, 4, 5, 6, 7 . Granted. See paragraph 9 of the Decision.
- 8 . Granted insofar as the Examiner's conclusions have been rejected. See paragraph 5 of the Decision.
- 9 . Granted in substance. See paragraph 14 of the Decision.
- 10 . Granted. See paragraphs 5, 10, 14, and 16.

[STIPULATION]

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MR. FISHER: Well, you could take Official Notice of the fact that the consulting agreement, the so-called consulting agreement was not filed with it, and additionally take notice of the fact that on Section ^{II} 2, page 5, in answer to question number ^{22(d)} ~~22~~, which was "Are there any documents, instruments, contracts or understandings relating to ownership, management, use/or control of the station or facilities, or any rights or interests therein?"

The answer was "no", and that right under it, it is printed, "If so, attach as Exhibit No. 'blank' copies of such documents, instruments or contracts, and state the substance of oral contracts or understanding."

And there was no exhibit attached in response to that.

PRESIDING EXAMINER: Any objection to that, Mr. Booth?

MR. BOOTH: Mr. Examiner, I would suggest it would be modified to this extent: That you take Official Notice of the following portions of the application -- Paragraph 2, subparagraphs A, B, and C; Part 1 of the -- Part 1, section ^I 2 of the application, which is a transferor's part; and also Paragraph 22, section ^{II} 2, page 5 of ^P part 3, which is the transferee's part, and that paragraph is that which has just been referred to by Mr. Fisher. In addition, that is agreeable.

I will stipulate that there is nothing submitted with the

application containing either a copy of any reference to a consulting agreement.

PRESIDING EXAMINER: All right, Mr. Fisher?

MR. FISHER: I think that would be all right.

PRESIDING EXAMINER: Notice as limited by Mr. Booth

1086 is taken and your stipulation is accepted.

Does that take care of you, Mr. Fisher?

MR. FISHER: Yes, sir. Thank you.

PRESIDING EXAMINER: Mr. Booth?

MR. BOOTH: Yes, sir.

65

FREDA BURRESS

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Will you please state your name, address and occupation for the record?

A Freda H. Burress, Post Office Box 166, Canton, North Carolina. Part-time bookkeeper for Station WWIT.

Q Did you read the Commission order designating this case for hearing?

A No, sir.

Q Are you familiar with the issues in this case?

A Some of them.

Q Do you know what application is pending before the Commission in this proceeding?

A No, sir.

Q How long have you been a bookkeeper with WWIT?

A I worked full-time from June 1954 until July 1965.

MR. BOOTH: What was that date?

THE WITNESS: July 1954 until July 1965 full time. And I worked part time from September 1965 and I am still employed.

BY MR. FISHER:

Q What do your duties as a bookkeeper involve generally?

66 A Writing checks, posting, bank statements, everything
that a bookkeeper does.

* * *

71 Q What was your understanding of the purchase price?

MR. BOOTH: Mr. Examiner, I would object to that as calling for a legal conclusion of the witness. We do have a problem that Mr. Fisher outlined in his opening statement that there was purchase of stock and there was also a consulting agreement and I don't want the question to be framed and the answer to establish that the so-called consulting agreement was considered as part of the purchase price or was actually part of the purchase price.

That is a legal conclusion to be argued, and if the question is so limited, then I don't have any objection. Otherwise I do. That is one of the things in issue here.

PRESIDING EXAMINER: Mr. Booth, I think it is entirely appropriate for us to find out what the parties were doing. Your objection is overruled.

MR. BOOTH: I have no objection to that, sir.

PRESIDING EXAMINER: You may answer, Mrs. Burress.

MR. FISHER: Could you read back the last question?

(The pending question was read by the Reporter.)

THE WITNESS: We understood that we were to pay them
72 \$40,000 and then have a consulting fee and it was broken down
into monthly payments and that was really what I was interested
in, the monthly payments, because I was wondering if I could

make those.

BY MR. FISHER:

Q Could you give us a total price of what your understanding was, how much you could buy the station for?

A For \$40,000 plus the consultant's fee.

Q Did you see the consulting agreement before it was executed?

A What do you mean executed?

Q Before it was signed?

A Signed by whom, by us?

Q By yourself and the other parties or by either party?

A Sir, I don't remember if I saw it or not. Mr. Edney took care of it.

* * *

78 Q Do you know who conducted negotiations for the purchase of the controlling shares of WWIT?

A The first time, you mean the time it was bought from Middleton and Edney?

Q That is right.

A The stockholders who bought it.

Q All six of them were involved in the negotiation; is that your statement?

A Sir, there were six of us and we might have all been together at times and we might not have. I can't remember. There were a number of meetings.

Q Was the participation in the negotiations for the

purchase of those shares conducted by all six of you or just by one or two of you?

A Well, Mr. Barry Madlin was the spokesman of the group. He was the one who took care of it.

Q On the part of the sellers?

A No, on the part of the purchasers. Mr. Middleton was the one on the part of the sellers.

Q Did you say that Mr. Edney negotiated for the six of you?

A No, I said Mr. Madlin, Barry Madlin, he was one.

79 Q Was it necessary to enter into this agreement with these persons?

A On the basis of the ones who were buying it, we hadn't a lot of experience in managing a station and we felt that we could use their services in helping us to manage the station because they had had a lot of experience.

Mr. Middleton had had a lot of experience, he knew. In fact, I didn't even know how to file the application. Mr. Edney did that and I didn't know how to do the FCC things and we agreed it would be best to have their services.

99 Q Do you know Mr. Bryant?

A Yes, sir, I do.

Q Did you ever write a check to Mr. Bryant?

A No, sir, I didn't.

Q Did you ever give Mr. Bryant cash from the funds of

WWIT?

A No, sir.

Q Who is Mr. Bryant?

A I know him when I see him, that is all.

Q Did you know that Mr. Bryant filed an application for a radio station?

A No, sir, I didn't know it.

Q Do you know it now that he did?

A I have been told that he did.

* * *

110 Q Did WWIT ever make a payment to Gates Radio in someone else's behalf other than for services performed through WWIT?

111 A No, sir.

Q Did WWIT ever make any payments for the expenses of Mr. Bryant that you know of?

A Not that I know of, no, sir.

Q Did WWIT ever receive any payment from Mr. Bryant?

A No, sir.

Q Do you know whether Mr. Bryant had ever taken advantage of WWIT tradeout travel account?

A No, sir, I don't know.

* * *

124 Q Did Mr. Paxton ever discuss Mr. Pressley's application with you?

A Nothing more than in a joking way.

Q Do you know whether he was in favor of the grant of

the application or whether he was not in favor?

A I am certain he couldn't be in favor of it, sir.

Q Do you know whether he was or not?

A I don't know, but anybody can assume that if competition is coming to town, that doesn't make him very happy.

Q Did he ever tell you what he would do about it?

A No, sir.

Q Did Mr. Watts discuss Mr. Pressley's application with you?

A No, sir.

Q Did he ever discuss it in front of you?

A No, sir.

Q Do you know whether he was in favor of the application?

A I am ^{sure} ~~here~~ he wasn't in favor of it, sir. I just assume that. I didn't talk to him about it.

Q Were you in favor of the application?

A It didn't make a whole lot of difference to me one way
125 or the other, but I would like not to have competition. It makes anybody work harder when you have competition.

Q Did you know if anybody ever tried to do anything to try to stop Pressley's application?

A No, sir, I didn't.

Q Did you ever suggest to anybody that there may be a move afoot to stop the Pressley application?

A No, sir.

* * *

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BY MR. FISHER:

Q Did you notarize Mr. Pressly's application?

A Yes; I did.

Q Do you remember when?

A Yes, I do. I don't remember the exact day.

Q Can you tell us as far as you can remember when?

A It was in March 1960.

Q Were you aware of the existence of this application before you notarized it?

A I had been told that it was being prepared. I wasn't aware of it other than that until I saw it.

Q Do you generally perform notary public services for anyone who walks into the station?

A Yes.

Q Was your notarization of Mr. Pressly's application done on the same basis?

MR. BOOTH: Excuse me. Could I have the preceding question and the answer, please?

PRESIDING EXAMINER: Read it, please.

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(The question and answer were read by the reporter.)

THE WITNESS: Well, I knew him. I knew his signature. That is what I was notarizing, his signature.

* * *

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CROSS-EXAMINATION

BY MR. BOOTH:

* * *

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Q Mr. Fisher asked a number of questions concerning the application for transfer of control of the licensee corporation of WHIT. I would like to ask you this:

Prior to the time the application was filed, did you, under the direction of Mr. Edney, prepare a draft of the application which was then mailed to ^{Mr. Elliot Lovett} ~~Mr. Lovett~~ in Washington?

A I prepared some parts of it, sir, and some parts he prepared.

Q Do you know whether the material you prepared and the material Mr. Edney prepared was mailed to Mr. Lovett in Washington?

A As far as I know, sir, it was.

Q Was there included in the material that you either prepared or saw a draft of what has later come to be known as
141 the consulting agreement?

A Yes, sir.

Q Is it your best belief and recollection that a copy of the draft of the consulting agreement was sent to Mr. Lovett?

A Yes, sir.

Q Prior to the time that the application was filed?

A Yes, sir.

* * *

150

BILLY E. BRYANT

was called as a witness and, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Would you state your name and address for the record?

A Billy E. Bryant, 19 Crockett Avenue, Asheville, North Carolina.

Q What is your occupation, sir?

A Real estate.

Q Do you work for any particular real estate company?

A I am a broker.

Q Under what name do you trade?

151 A Billy E. Bryant.

Q Is that your full-time occupation?

A No, sir, several other things. I am in the home improvement business, construction. I do several things.

Q You mention home improvement. Under what name do you trade in home improvement?

A Bryant Construction Company.

Q Have you ever filed an application for a broadcast station with the FCC?

A Yes.

Q When was the application filed?

A In 1960.

Q What was the proposed location of the station?

A Asheville.

Q Is that Asheville, North Carolina?

A Yes.

Q What was the proposed frequency of the station?

A 920.

152 Q Is that 920 kilocycles?

A Yes, sir.

Q When did you first get interested in applying for a radio station?

A In my early years I had talked to and known several people in the radio business. Maybe it was in my subconscious or something but it was in 1960, early part of 1960, that I became interested.

Q When did you first develop an interest in applying for a radio station specifically in Asheville, North Carolina?

A In 1960.

Q What efforts did you make to ascertain the needs of Asheville for a radio station?

THE WITNESS: I didn't * * * make any survey or study because I am not familiar with the radio business, even after what I have been through. I was approached by a friend, Hal Edwards, in regard to application for a radio station. He had been in it several years.

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BY MR. FISHER:

Q Did he suggest to you that you apply for Asheville?

A Yes.

Q How did you decide what frequency to apply for?

A He recommended it, right in the middle of the dial.

Q Did he explain to you why you should file for 920 kilocycles in Asheville, North Carolina?

A He didn't explain very much, Mr. Fisher. He had known me since 1956. He was an employee of mine.

* * *

154

Q Did Mr. Edwards explain to you what his interest was in having you apply for a station?

A He ultimately wanted to own part interest in the station.

Q Did he want to reserve an ownership interest for anyone else other than yourself?

A No.

Q Did he explain to you why he didn't apply for the station, himself?

A Not that I remember.

Q Do you know why he didn't?

A Well, possibly he wasn't financially able. I don't know why he didn't.

Q Were you financially able to apply for that station?

A Yes, sir.

Q What kind of financial requirements were there?

A He explained that you had to have a certain amount of money or have possessions in tangible objects or liquid assets to operate for a certain period of time without any consideration of income from that station.

Q Did you ever promise an ownership interest to Mr. Edwards?

A Upon proven ability.

Q How large an interest?

A A quarter interest.

155 Q Was it your plan to retain a three-quarter interest for yourself?

A Yes, sir.

* * *

Q Do you know Mr. Dalton Paxton?

A Yes.

Q How long have you known him?

A Since 1956, 1957, somewhere in that neighborhood.

Q How well did you know him in 1956 and 1957?

A In ¹⁹⁵⁶~~1956~~ and 1957 we had coffee together.

Q How often?

A Once a week, maybe. It has been a long time.

Q That was the extent ^{of} your association in 1956?

A Yes.

* * *

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Q When did you see him again?

A I saw him again in 1960.

Q How did you happen to meet him in 1960?

A I can't remember, it has been so long, but I found out through a friend that he was in the radio business, which I didn't know.

Q Was this friend Hal Edwards?

A I don't believe it was Hal Edwards. I am not sure.

Q It could have been Hal Edwards?

A It is possible.

Q Did you approach Mr. Paxton in 1960 first or did he approach you?

A I approached him.

Q What did you approach him about?

A Soliciting his help due to the fact he was in the radio business and knew something about it, I knew nothing. I talked to quite a number of people.

* * *

157 Q Then you approached Mr. Paxton and solicited his assistance. For what purpose?

A In any position or any way he could help me, advice or what have you, since he already had a station.

Q What advice or help did he give you in response to your request?

A I don't know exactly how much or why. He did help me all he could.

Q Did he help you prepare the application?

A No.

Q Did he help you locate an engineer?

A No.

Q Did he help you to get a lawyer?

A No.

* * *

159

BY MR. FISHER:

Q Let me clarify that question.

Could it have been Mr. Dalton Paxton who gave you either Mr. Palmer Greer's name or Mr. Palmer Greer's telephone number?

A No.

Q Did you know that Mr. Palmer Greer was consulting engineer for WWIT?

A No, I didn't.

Q Did Mr. Palmer Greer tell you that when you approached him about the application?

A I don't remember if he did or didn't, because that wasn't the reason I talked to him.

Q What was the reason that Mr. Palmer Greer did not prepare your engineering?

A I believe that it was time. He was busy and didn't have the time to do it.

* * *

161

Q Are you saying that it is your understanding that if you file an application for the same frequency as a then pending application you can get consideration faster?

A This is my understanding now.

Q In other words, you have to file by a specific time because there was an application already pending for that

frequency. Is that correct?

A This is my understanding now. At the time I filed my application I wanted a radio station. I wanted the 920 frequency because Hal explained to me this was the best frequency.

Q The reason it was the best frequency is that there was already an application pending for it?

A No, that wasn't the reason. Because it was in the center of the dial -- well, I don't know the terminology but it was a good frequency, in other words.

Q You did not understand at the time why applications are filed on the same frequency as another pending application would be processed faster than others but you do seem to understand it now.

Do you think that Hal Edwards' reasons for urging you to file for 920 kilocycles was because there was a pending application for 920 kilocycles already in the file?

A I have no idea. He explained it to me it was the best frequency and we could get it without this long waiting period, and I took it at face value.

* * *

163 Q Was anyone with you then on your trip to Washington, D. C., to see Mr. Nugent Sharpe?

A I believe I had Mr. Paxton with me.

* * *

164 Q Did you visit with Sam Miller personally?

A Yes.

Q Was Mr. Paxton with you then?

A I don't know, sir. I don't think so.

Q Could he have been with you?

165 A It is possible.

166 Q Who prepared the application that you brought up with you on your first trip to Washington, D. C.?

A Gene Slatkin, I believe.

Q Do you know if Mr. Slatkin worked for WMIT at the time?

A Yes, I found out he did.

168 Q I am sorry, I am not sure whether you answered the question, did Mr. Dalton Paxton give any instructions to Mr. Slatkin concerning the preparation of your application?

A No.

Q Did Mr. Paxton give Mr. Edwards any suggestions or help in the preparation of the application?

A I don't even remember if Mr. Paxton and Mr. Edwards were together at the same time Mr. Slatkin was helping me with the application.

173 Q Do you know whether Mr. Dalton Paxton was interested in your filing the application for a radio station in Asheville, North Carolina?

A I have no way of knowing if he were interested.

Q Did you ever discuss your application with Mr. Paxton?

A I did.

Q Did he show an interest in filing it?

A He was willing to assist me.

Q To what extent?

A To the extent of advice.

182

Q Who paid for any of the trips you took to Washington, D. C.?

A I paid Mr. Paxton's way. I charged it to my American Express credit card.

Q You paid for your own trip?

183

A I paid for my own, and his.

Q Did Mr. Paxton ever pay for any of your trips to Washington, D. C. either before or after your ^{radio} ~~rate~~ application was filed?

A No.

Q Who paid Mr. Nugent Sharps for the engineering he performed on your application?

A I did.

Q How did you pay him?

A I paid him by check and some cash, I believe. I don't remember. It has been a long time.

Q Did you pay Mr. Slatkin anything for his work on your application?

A I paid him \$50.

Q How did you pay that -- with check or cash?

A Cash.

Q Do you know whether Mr. Slatkin received payment

from anyone else for working on your application?

A I have no way of knowing.

184 Q I don't know if we have your lawyer's name in the record yet, but I will ask to make sure. Who was your Washington attorney who worked on the application?

A Sam Miller.

Q Who paid Mr. Sam Miller?

A I did.

Q How did you pay him?

A Some cash and some checks.

* * *

199 Q Did you approach Mr. Slatkin to ask him to help you
200 on your application?

A Yes.

Q What was your reason for approaching him?

A Because he had an application in at Black Mountain and I had known Mr. Slatkin. We were from the same town, Gastonia, North Carolina. * * *

220

EUGENE SLATKIN

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q State your name and address, please.

A Eugene Slatkin, 203 Tomahawk Avenue, Black Mountain, North Carolina.

Q What is your occupation, Mr. Slatkin?

A Well, presently I am working as a radio time salesman with WLOS in Asheville.

Q Did you ever work for station WWIT at Canton, North Carolina?

A Yes, I did.

Q Could you tell me the dates on which you worked there?

A Well, approximately February '60 to the latter part of April or early part of May 1960.

Q Who was your immediate supervisor?

A Dalton Paxton.

* * *

223 Q Did Mr. Dalton Paxton ever ask you to help Mr. Bryant in the preparation of the application?

A Yes.

* * *

234 Q Did you receive any payment for your work on the application?

A Yes, I did.

Q Who gave you that payment?

A Mr. Paxton.

Q In what form?

A A check.

Q How much was the check for?

A Fifty dollars.

Q Is that the only payment you received?

A Yes.

Q Did Mr. Bryant pay you anything?

A No, he did not. I testified in an earlier hearing that he did, but since then, I have given it quite a bit of thought, and my answer during that hearing was in error. I did not receive -- there was a lot of money changed hands, but I didn't receive any at the house.

Q I will show you check number 4920.

A I made that change. The date was --

Q Made out to Mr. Eugene Slatkin in the amount of \$50, signed by, purportedly signed by Mr. Dalton R. Paxton, and Sidney A. Watts, drawn on the Western North Carolina Broadcasters Inc., account in the First Union National Bank of Canton, North Carolina.

235

Is that the check that Mr. Paxton handed to you?

A Yes.

Q Where did he hand this check to you?

A I am not positive about the location. It could have been at the station or elsewhere. I don't recall where it was.

Q Was it on the date that you worked on the application, or was it subsequently or before?

A Well, the check is dated 5-30, and that was in error, and I scratched through it, and put 4-30, in my writing, because that meant I wouldn't have been able to cash it until June.

* * *

236

PRESIDING EXAMINER: Mr. Slatkin, you told us a moment ago about some earlier testimony, can you tell us where and when

you gave that?

237

THE WITNESS: This was during the hearing in Washington to enlarge issues. No, it wasn't to enlarge issues. It was the actual hearing was held.

BY MR. FISHER:

Q Was that the hearing for Mr. Pressley's application for a new station in Canton, North Carolina?

A Yes, that is right. That was the hearing. I was designated. I read the transcript later, and there wasn't available to anyone unless the attorney involved or someone got prepared it prepared for him, and I read it, and I was surprised to note that I had acknowledged in the testimony that I gave concerning money received by Bryant at home, because this was incorrect, and it wasn't caught by me or the attorneys at the time. And I am sorry for it. Of course, it was a little bit late to go back and do anything at that point, but I noticed it again recently, when I went through it, and this, I wanted to clarify.

* * *

238

MR. REILLY: What I have in front of me is Volume 2 of Docket No. 14007, and I find on page 460 of the transcript the following colloquy with Mr. Slatkin being the witness:

Question: "I believe that you were compensated for preparing the application."

Answer: "Yes, I was."

Question: "Did you receive money that day?"

✓Answer: "Yes, I did."

✓Question: "How much money did you receive that day?"

✓Answer: "\$50."

✓Question: "From whom?"

✓Answer: "Billy Bryant."

✓Question: "In what form?"

✓Answer: "Cash."

239

MR. FISHER: And going over onto page 461 of the same transcript, the next question was: "Did you receive a check from Mr. Dalton Paxton in the amount of \$50?"

And the answer was: "Yes, I did. Not that day."

MR. BOOTH: Read the next two lines, too, then, while you are at it.

PRESIDING EXAMINER: It is your turn, Mr. Booth.

{Laughter}

MR. BOOTH: Then the question was: "Sometime later?"

And the response was, "Yes." And we have read now in the record, Mr. Examiner, from page 460, line 15 through page 461, line 5.

PRESIDING EXAMINER: Gentlemen, may I assume that nobody has any objection to my taking notice of that?

Without objection, notice is taken.

MR. BOOTH: None whatsoever.

MR. FISHER: None whatsoever.

* * *

Q Do you have an explanation for the discrepancy between your testimony now and your testimony of the other proceeding?

240

A Well, during the course of the day, which if my memory serves me right, was rather warm, and I had -- I was sitting down, and I didn't have much lunch, and I was drinking beer. I believe I had six or seven cans of beer, and I am not a drinking man, you know, by any means, but on an empty stomach, you know, it can -- not that it had anything to do with my memory, I don't think, at the time, but I didn't have much lunch that day, and there was a lot of confusion, and I had heard what really upset me was at the time of the hearing, I think, was that I had heard Hal Edwards state that he saw me receive money, and I just was beyond myself trying to figure out how he saw me receive money, and I didn't think I had.

Q You mean to say that Mr. Hal Edwards testified before, and you heard his testimony?

A Yes. No, I wasn't in the room at the time, but this is what he said.

PRESIDING EXAMINER: How did you know that, Mr. Slatkin?

THE WITNESS: Well, I have recently seen transcripts, I mean, not recently, but after the hearing and all, I saw the transcripts when they were sent down to Asheville.

PRESIDING EXAMINER: No, sir, if you weren't in the room when Mr. Edwards testified, and you testified right after him, how did you know what he said?

THE WITNESS: Well, I didn't know it then. Actually, I didn't know it then.

241

PRESIDING EXAMINER: Then how did it serve to confuse you?

THE WITNESS: It didn't serve to confuse me at that particular time. It has something to do with the reason that I have decided to bring it out in the open that it was erroneous at the hearing.

* * *

PRESIDING EXAMINER: Well, now, Mr. Slatkin, I had understood the answer that you gave us just a moment ago was in response to Mr. Fisher's question as to why you were confused at the time. Are you now telling us that Mr. Edwards' testimony had nothing to do with your confusion at the time?

THE WITNESS: At that particular hearing, because we weren't in the room when everybody was giving testimony.

PRESIDING EXAMINER: Gentlemen, we will take our five-minute recess.

* * *

Q Mr. Slatkin, I am showing you from Docket 14007, Volume 1, an affidavit. Does that affidavit have your signature?

A Yes, it does.

242

MR. FISHER: Could I ask that official notice be taken of the affidavit?

MR. BOOTH: Well, if you want to identify it by date so I can get a copy of it and know what we are talking about.

BY MR. FISHER:

Q What's the date on that affidavit, Mr. Slatkin?

A The 5th day of May, '61.

MR. FISHER: This is an affidavit attached as an exhibit to opposition to motion to enlarge issues and petition to enlarge issues filed by B. E. Bryant, received in the office of the Secretary of the FCC on May 8, 1961.

* * *

243 MR. FISHER: All right, I agree to that. I offer this as Pressley Exhibit No. 1.

PRESIDING EXAMINER: The document will be identified as Pressley No. 1.

(The document referred to was marked for identification as Pressley Exhibit 1.)

PRESIDING EXAMINER: And without objection, it is received in the record.

(The document heretofore marked for identification as Pressley Exhibit 1 was received in evidence.)

* * *

248 Q Was it your intent in your affidavit of May 5, 1961, to deny all allegations of the Joe B. Pressley affidavit that you just identified?

A Yes. ^{It was suggested} ~~Is that suggestion~~ at the time of the -- instead of making a denial in detail, we made a general denial. If there is any difference, I don't know. I didn't spell out any details.

* * *

260 Q Did you ever retract the statements made in this affidavit, at any subsequent occasion?

A Yes, I did.

Q When did you do that?

261 A The exact dates, I am not sure, but there was this business of an adverse examination that came about, and I believe I was served with some papers to this effect, and it upset me quite a bit. To complicate the issue, Mr. Pressley was consistently calling me or coming to see me, trying to have me make affidavits satisfactory to what he wanted, and I was afraid of involvement in something that I didn't want to get involved in.

MR. BOOTH: Could we have which Mr. Pressley identified?

THE WITNESS: This is Mr. Vernon Pressley. And the sequence of dates leaves me cold, because I don't remember whether this adverse testimony preceded his visits, or it was evidently it did, because it was at that time that I retained a local attorney, or about that time, and went from there with him. This is my counsel.

BY MR. FISHER:

Q When you talk about an adverse examination, is that an adverse examination conducted by Mr. Vernon Pressley's attorney?

A Yes, Mr. Cogburn.

Q Was that in connection with the lawsuit he brought against you?

MR. BOOTH: Mr. Cogburn, or somebody else. I object, Mr. Examiner. It is too vague.

BY MR. FISHER:

Q Did Mr. Vernon Pressley bring a lawsuit against you?

A Yes. Yes.

262 Q And that resulted in an adverse examination by Mr. Cogburn, Mr. Vernon Pressley's attorney. Is that correct?

A Yes.

* * *

Q From Volume 3 of Docket No. 14007, I show you an affidavit that is marked in that docket Vernon E. Pressley Exhibit No. 11, which purports to be an affidavit dated September 9, 1961. Does your signature appear on that affidavit?

263 A Yes, it does.

Q Is this the affidavit that you prepared at the time the adverse examination or lawsuit was pending against you?

A Yes.

* * *

265 Q What was the purpose of your affidavit?

A The purpose of the application --

Q Of the affidavit.

A -- of the affidavit was to make clear to the Commission, or attempt to make clear that my involvement leading up to that particular time, in connection with the affidavits that Mr. Pressley had filed, the affidavits that I had given in Mr. Miller's office, or the affidavit that I signed, and the adverse examination, it was trying to clarify my position in

respect to these events, and what actually had happened or transpired.

MR. FISHER: Mr. Examiner, may I ask at this time that official notice be taken of Vernon E. Pressley's Exhibit No. 11 in Docket No. 14007?

* * *

267

PRESIDING EXAMINER: The proffered document will be identified as Pressley No. 2 and is received into evidence.

(The document referred to was marked for identification as Pressley Exhibit No. 2 and was received in evidence.)

* * *

269

Q Now, Mr. Slatkin, did you ever advise either Mr. Joe Pressley or Mr. Vernon Pressley about Mr. Paxton's instructions to you that you work on the Bryant application?

A Yes, sir.

Q Which Mr. Pressley is it that you so advised?

A Joe.

* * *

273

Q Did you see anybody hand money or a check to anyone else in Mr. Bryant's home?

A Yes, I did.

Q On April 27, 1960?

A Yes, I did.

Q Who was the person who handed the money or check?

A Mr. Paxton handed Mr. Bryant a check.

Q Mr. Paxton handed Mr. Bryant a check. Did you know

at the time the amount of the check?

274 A Well, in all fairness, I would like to say that at this particular time, because of the notoriety involved in this situation, that I assumed the check was for \$500. I stated previously that it was for \$500, but I don't think we went into detail previously as to whether the check was handed to me and I examined it, and this sort of thing.

I would say there was a check, and it was handed to Mr. Bryant.

Q Now, on what grounds did you then or do you now assume that the check was for \$500?

A Well, I must have seen it. I guess that is the reason. I must have seen the check originally.

Q Do you remember seeing it?

A Yes, I remember seeing the check, and whether I -- whether it was handed to me or whatever, but it was present in the room with me at the time, and there was some conversation concerning the check, but I was busy, remember.

Q Did you see who the check was payable to?

A No, sir. And I stand to be corrected. I could have.

* * *

276 PRESIDING EXAMINER: Was this a conversation between Mr. Bryant and Mr. Slatkin at the time about the check, sir?

THE WITNESS: Yes. Yes. It has been six or seven years ago, and I have had, you know, previous testimony where I could look and recall and remember. Then I would be sure of answer-

ing these things in such a way that it would be indicative of my previous testimony, but it is hard for me to, you know. I don't want to say exactly no.

PRESIDING EXAMINER: Mr. Slatkin, if you don't remember, please just tell us that, sir.

THE WITNESS: All right.

PRESIDING EXAMINER: Now, if you do remember, we want to know what it is, but if you don't remember, we want to know that, too.

THE WITNESS: I prefer to retract that, and say that I don't remember.

* * *

277

Q Do you know what the initial retainer for -- the amount of the initial retainer to Mr. Nugent ^{Slape} ~~Sharp~~ was?

A I believe \$1500 -- \$1200, \$1500.

Q Was that the initial retainer or the entire amount?

A Oh, the initial retainer, I would say, was \$500.

Q On what basis do you state that it was \$500?

A Well, I prefer, then, to retract that statement and say that I don't remember.

* * *

278

MR. FISHER: Mr. Examiner, the witness already testified that he knew that it was \$500. His answer to my question as to how he knew, he said that he didn't remember.

MR. BOOTH: But he retracted that testimony.

PRESIDING EXAMINER: I thought he had, Mr. Fisher. Is my memory faulty?

MR. FISHER: I didn't so understand. May I ask the witnesses?

BY MR. FISHER:

Q Mr. Slatkin?

A Yes, I retracted that, because I don't remember.

Q Your answer is you don't remember Mr. Nugent ^{Sharp's} ~~Sharp's~~ initial retainer?

A Right.

Q Did you also retract the testimony concerning the amount of the check or the purpose of the check?

MR. BOOTH: Mr. Examiner, the record will show, and if the counsel wants to know, I suggest that he ask the reporter to read it back.

PRESIDING EXAMINER: Overruled.

THE WITNESS: Well, in answer to that question, I will just say that I don't remember, because it has been a long time ago.

* * *

Q When you undertook to work on Mr. Bryant's application, what were your reasons for accepting that assignment?

A I was asked to do it, for one thing. And for another, I could use the compensation. It was a matter of wanting a little extra money, and being off the entire day, and that was the reason.

* * *

306

Q Mr. Slatkin, I show you from Volume 3 of Docket No. 14007 an exhibit that was then marked Vernon E. Pressley Exhibit 12, which purports to be an affidavit. Was an affidavit like this signed by ^{you} ~~you~~?

A Yes, sir.

MR. FISHER: Mr. Examiner, I would like to introduce this affidavit as Pressley Exhibit No. 3 for the record for the purpose of showing at that time only that Mr. Slatkin did execute an affidavit of this sort.

* * *

307

Q Was this document, this affidavit, prepared with the assistance and under the guidance of Attorney Willson?

A I can't say for sure, sir. I don't recall.

Q And do you recall now the circumstances which led to your preparing this affidavit or at least executing this affidavit?

A This particular affidavit, I can't get it clear in my mind why it was prepared. It seems to be a follow-up on the one that was sent in, the original that was prepared by Cogburn and Willson together.

Q Was not this affidavit of November 24, 1961, prepared or executed by you with the hope of avoiding appearing in Washington to testify in the Pressley hearing?

A Yes, sir.

MR. BOOTH: Mr. Examiner, I have no objection to its being received, for the same limited purposes as Pressley Exhibits 1 and 2.

308

MR. REILLY: And on the same basis, no objection, sir.

PRESIDING EXAMINER: With that qualification, the document will be identified as Pressley No. 3, and is received.

(The document referred to was

marked for identification as

Pressley Exhibit 3 and received

in evidence.)

* * *

CROSS-EXAMINATION

BY MR. BOOTH:

* * *

310

Q Now did Mr. Bryant ever ask you to assist him in preparation of his application?

311

A No.

Q Then is the statement in paragraph 8, page 2 of Pressley Exhibit No. 3, your affidavit of November 24, 1961, inaccurate?

A Your Honor, Mr. Examiner, if I may, I would like to retract that. The details of the who called aren't clear enough for me to give a definite yes or no, I mean, a definite yes. I have reservations about that.

Q And as a matter of fact, the time that the calls were made with respect to date are not too clear in your mind, are they?

A That's true, sir.

Q So you would not want to be bound by any answers you have given today to questions of that sort?

A Yes, sir.

Q Or questions on that subject.

PRESIDING EXAMINER: Yes, you would want to be bound, or no, you wouldn't?

THE WITNESS: I would not want to.

313

Q And at the time you typed the affidavit, had you not been instructed to make the same corresponding statements as appeared in an affidavit of Joe Pressley? So that there would not be a conflict in your affidavit and an affidavit executed by Mr. Pressley?

A There had been prior discussion during the meeting before the affidavit was drawn, and there was an equitable understanding among the parties present as to the content that we see before us.

I don't remember whether it dealt, as you say, with the other affidavit of Mr. Pressley's or not.

Q Please look at the top of page 4 of the affidavit of September 9th. The first line. Did not the first line, as you, as was first typed, state, "that this party Joe Pressley states that B. E. Bryant gave him the sum of \$50 in cash," and did you not then substitute the name "Eugene Slatkin" for the name "Joe Pressley"?

A Evidently I did.

Q And what led you to insert the name "Joe Pressley," as initially in that line?

A I have no way of knowing that.

Q Now you have testified this morning that the testimony you gave in the Pressley hearing to the effect that Mr. Bryant gave you \$50 in cash for the assistance you rendered to Mr. Bryant was incorrect.

314 Now, sir, I direct your attention to the first sentence on page 4 of the affidavit of September 9th, 1961. Is that statement also incorrect?

A Well, I will say this: In connection with that \$50, after becoming involved, if I may take the liberty to speak here, in the application and the adverse examination, and going to Washington, and these involvements that I was finding myself in, sort of as a pawn of these two men, I began to search for some good advice, and the only advice I was getting was the advice that they were giving me, and this \$50 is a fabrication of the thinking of those parties who were involved at that time, which were Mr. Paxton and Mr. Bryant.

It was a service, and there was \$50 involved, but today, I ^{seen} ~~seen~~ an opportunity to rectify it for the record that there was no money exchanged at the house that day, and the only payment I received was by check.

Q And you received a check for \$50 at the house, that day?

A No. I received a check later.

Q So the statement in the first sentence on page 4 of

your affidavit of September 9, 1961, is false. Is that correct?

A Yes.

Q Now for what purpose did you understand you were paid \$50 by a check of Western North Carolina Broadcasters, Inc., dated April 30, 1960?

315 A The check that I recieved from WWIT was for my services in preparing the application.

Q Now, sir, I direct your attention to page 4 of your affidavit of September 9, 1961, Pressley Exhibit No. 2, and ask if the following statement is false: "That for purposes of clarification, Dalton Paxton did pay said affiant by check the sum of ^{\$50.00} ~~\$50~~ for extra work at the station while said affiant was under his employ in preparing a format for an all day musical program which did not come within the requirements of said affiant's employment."

Again, I ask you, sir, was that statement false?

A Well, the meeting that we had with the two lawyers, all this was discussed, was \$50. And actually, there was nothing ever said about my receiving \$50 from the -- I don't mean that.

I don't think that we had agreed on any set amount for the work that I didn't actually have anything to do with the work. It was a ^{format} ~~song~~, called Tempo, that was used by a lot of other stations, and there wasn't any research or any effort involved. It was a matter of bringing it in and laying it down, and

suggesting that they use it to change their programming. And the \$50 for the formula Tempo was something that I did not expect to receive.

Q But you did receive \$50 for that work.

A I received \$50 for the application.

316 Q Did you receive \$50 for as compensation in preparing a format for an all-day musical program, as stated in the first fully paragraph of page 4 of your affidavit of September 9, 1961? And the answer can be yes or no.

A Well, I have already stated that I didn't receive it, so the answer has to be no.

Q So the statement in this affidavit concerning receipt is false.

A Yes.

Q Now did you prepare a musical format known as Tempo for WWIT?

A I didn't prepare it.

Q I beg your pardon?

A I did not prepare it. I had it in my possession. It was prepared by someone from Charlotte, who originated the idea.

Q And you submitted a written description of the idea or the format to Mr. Paxton?

A I brought the original copy that I owned to Mr. Paxton and he had copies made from this original copy that used other stations' call letters to his own call letters, and made

his own copies from it.

Q I show you a document which is headed "Radio Today", consisting of five pages. Have you ever seen that document?

A Yes.

317 Q Is that the document you are referring to in your testimony at this time?

A Yes, it is.

* * *

319 Q Now, you have talked from time to time about the grant of a station and the operation of a station at Black Mountain. Were you once the licensee, together with your brother David, of station WBMT at Black Mountain, North Carolina?

A Yes, I was.

Q Was not the license of that station revoked by the Federal Communications Commission?

A It was.

PRESIDING EXAMINER: Excuse me, Mr. Booth. Our reporter doesn't have copies of that exhibit.

BY MR. BOOTH:

320 Q Mr. Slatkin, let's return for a moment to the meeting that you had with attorneys Cogburn and Willson at which you prepared and executed your affidavit of September 9, 1961, Pressley Exhibit No. 2. Were not Mr. Vernon Pressley and Joe Pressley at that meeting?

A Yes, they were.

Q And they participated in the discussions which were

held at that meeting?

A Yes.

Q And at that time -- now I have shown you or supplied to you a copy of a Memorandum Opinion and Order of the Federal Communications Commission released July 8, 1963 which bears the number in the upper right-hand corner FCC 63-628. Have you seen that document before?

A Yes.

Q By that document, was not the license of station WBMT revoked?

A Yes, it was.

* * *

321 MR. BOOTH: Mr. Examiner, I would ask you to take official notice of the Commission's Memorandum Opinion and Order to which I have referred in Docket 1497 and I would like to have marked for the record as a convenience as WWIT Exhibit No. 2 a photostatic copy of that Memorandum Opinion and Order.

MR. FISHER: No objection.

MR. REILLY: No objection to its being so identified, of course.

PRESIDING EXAMINER: Without objection, it is so ordered.

(The document referred to was
marked for identification as
WWIT Exhibit No. 2.)

* * *

322

MR. BOOTH: It is offered for the purpose of showing the facts found by the Federal Communications Commission upon which it based a revocation of the license of Station WBMT, and the purpose is to attack the credibility of this witness.

MR. FISHER: No objection.

MR. REILLY: No objection.

PRESIDING EXAMINER: All right, gentlemen, it is received.

(The document heretofore marked
for identification as WWIT
Exhibit No. 2 was received in
evidence.)

324

* * *

Q Now, in April of 1960, you were expecting a grant momentarily, were you not, of your Black Mountain application?

A Yes, sir.

Q And you have testified that you were interested in working on the Bryant application because you would like to have some additional money?

A Yes.

Q In fact, in April of 1960 you were concerned about funds available to you to build the Black Mountain station, were you not?

A That is true.

Q Did you ever tell either Joe Pressley or Edgar Pressley that you would be interested in picking up some additional money?

A For what reason, purpose?

Q Well, did you just tell them at any time --

A I don't remember.

Q Did you ever discuss with either of them the financing of your Black Mountain station construction?

325 A I don't remember.

Q Now, when Mr. Paxton, according to your testimony, asked if you would be interested in assisting in the Bryant application, did you not explain to Mr. Paxton that you were scheduled to work on April 27th and that your time would be limited?

A I don't remember.

Q Is there a possibility that you may have made such a statement to Mr. Paxton?

A It would have been routine.

Q I beg your pardon?

A It would have been a routine statement, I think.

Q So there is a possibility that you may have made such a statement?

A Yes.

* * *

326 Q Did you ever tell Mr. Pressley on April 29, 1960, that you had received a check from station WWIT or the licensee, or a check from Mr. Paxton, in the amount of \$50 on April 28, 1960?

A I don't remember.

Q Now, you have identified a check dated April 30, 1960

as having been received by you. Did you receive any other check in the amount of \$50 from station WWJT or the licensee corporation?

A That check was dated that, but I don't think I got it the day it was dated.

Q You may have gotten it a day or so after that?

A A week later, might have.

Q But you didn't get it on a date before April 30th, did you?

A No, sir.

Q So it would have been impossible for you to have told Mr. Joe Pressley on April 29th that you had received a check on April 28th, would it not?

327 A I think so.

* * *

330 Q In connection with the legal action which Mr. Vernon Pressley instituted against you, did you not request your attorney to file an application of request for restraint or restraining order or an injunction to halt the taking of the adverse examination?

A Yes, I did.

Q Did you not sign a verification which accompanied the complaint? And to assist you in your answer I will show you what I believe to be a typed copy of that document.

I might say, Mr. Examiner, that -- well, I won't make any further statement at this time.

The next exhibit number is 3?

MR. FISHER: Did you identify it as a restraining order?

MR. BOOTH: I was going to identify it further.

BY MR. BOOTH:

Q Mr. Slatkin, I direct your attention to the heading of this document. Is it not headed "Eugene Slatkin, Plaintiff, versus Vernon E. Pressley, Defendant"?

331 A Yes, it is.

Q Did not your signature appear on a sworn verification under date of August 14, 1961 on the last page of this document?

A Yes, it did.

Q Is not this a copy of the document which was filed by your attorney which led to the issuance of a restraining order or injunction halting at least temporarily the taking of your adverse testimony?

A Yes.

Q Are the facts set forth in this document true and correct? Were they true and correct to the best of your knowledge and belief at the time you executed the verification on August 14, 1961?

A I don't know. I would have to read it and see.

Q Would you please, sir?

A It is really something, isn't it? Yes.

Q After reading the document, do you know of any facts in that document which you now believe are not true?

A Well, I didn't read through the entire thing and weigh each sentence. In essence, I tried to help Mr. Pressley with some information and then he brings charges against me, involves me in it. This is the situation I was in at the time. It was a restraining order. I would say they are true. I signed it; yes.

332 MR. BOOTH: Mr. Examiner, I offer in evidence WWIT Exhibit No. 3.

MR. FISHER: Mr. Examiner, I object. I don't see the materiality of this evidence to the issues in this case.

MR. REILLY: If it is understood that it comes in on the same limited basis that it is simply a document sworn to by the witness, during the crucial period within the framework of the issues, although not directly concerned with the earlier case, certainly tangentially concerned with it, and not necessarily for the truth or falsity of its contents, I would not object.

MR. BOOTH: I am not offering it for the truth or falsity of its contents at this time, but only for the purpose of showing what was represented to the court over the verified signature of this witness.

MR. FISHER: May I ask the witness a few questions about this exhibit?

PRESIDING EXAMINER: Voir dire examination? Go ahead, sir.

VOIR DIRE EXAMINATION

BY MR. FISHER:

Q Mr. Slatkin, was this paper entitled "Complaint to be used as an affidavit" prepared by your attorney?

A Yes.

Q Did you read it over carefully before you signed it?

A No, I didn't. As a matter of fact, I am sitting here thinking it is the first time I have ever looked at it in any detail.

333

Q Do you remember whether your attorney summarized the contents or made any remarks as to the contents?

A Yes.

Q Was your answer yes?

A No.

MR. BOOTH: In other words, the answer is he doesn't remember.

THE WITNESS: I don't remember if he did spell it out. He had it all prepared, I think, for signing when I got there and we discussed it and I assumed it was a method to restrain and that was all.

BY MR. FISHER:

Q In other words, your understanding was that this paper would stop the adverse examination; is that correct?

A Yes.

Q And with this understanding, you signed it without

having read it in detail.

A Yes.

MR. FISHER: Thank you. I have no objection for the limited purpose Mr. Booth has offered it.

PRESIDING EXAMINER: The document will be identified as WHIT Exhibit No. 3 and subject to the stated qualifications it is received into evidence.

334

(The document referred to was marked for identification as WHIT Exhibit No. 3 and was received in evidence.)

338

* * *

BY MR. REILLY:

Q Turning for a moment, Mr. Slatkin, to Pressley Exhibit No. 2, which is your affidavit in the earlier proceeding dated September 9, 1961, do I understand your testimony now and previously that you typed this affidavit?

A This is the one prepared by Mr. Cogburn and Mr. Willson?

Q Yes. Do you have it before you?

A Yes, I believe I do.

Q It consists of four pages and a jurat.

A It looks too good to be typed by me, but I remember typing that night.

339

Q Did you type it all, sir?

A I don't recall whether I typed it all. I think somebody started it and they were using a peck system and then I said, "Well, let me take a swing at it," and through the years I have sort of learned to type. I think I did the better job of the four of us, so I just continued on. I guess maybe I completed it.

Q Which part of this did you not type?

A Well, I am not sure. Maybe someone else could clarify that point, but I remember I did typing on it, and it seems -- it seems that the first part here, trying to remember, if the young lady didn't start it, and then had to leave, and maybe later, when Mr. Pressley gets up here, he can explain that away, but you can kind of tell where it changes.

It looks like it is professional, and then about the third page it looks like somebody who didn't know what they were doing took over, you know. I mean, it is all messed up, and runs off the line and everything else, but the first two pages are rather professional and the third page begins to look rather amateurish.

340

Q This is precisely the area I wanted to go into. Can you identify that part of the affidavit which you typed?

A Yes, sir.

Q What parts are they?

A You want me to identify certain parts?

Q Yes, please.

A Well, it seems to be correct, the information there. Discussing with Vernon Pressley the application of Vernon Pressley.

Do you want me to pick certain things and comment on them, or what?

Q Or certain pages and comment on them.

A Well, you notice here --

MR. FISHER: Mr. Examiner, I have to object. I think he was asked to identify the portions that he typed.

THE WITNESS: Oh.

MR. FISHER: And those portions haven't been identified yet. All of a sudden, the question became quite a bit broader.

PRESIDING EXAMINER: Have you abandoned your original question, Mr. Reilly?

MR. REILLY: No, he sought to limit the question. I sought to accommodate myself to the witness. All my questions still remain, identify for me, if you will, for the record, those portions which you personally typed.

THE WITNESS: Well, I would say the third page. It looks

341. like I improved with the second page. I would say possibly the last three pages.

BY MR. REILLY:

Q Now by the last three pages, so that we can be clear, do you mean as the last page that which includes your signature, and the notary signature?

A I would say so.

Q Did you use the same typewriter which the young lady whom you have described used to type the first two pages? Do you recall?

A Well, I am not confirming the fact that a woman did, or a secretary did prepare the first two pages. It could have been done by Mr. Willson, or Max Cogburn. I don't remember. But it is a possibility she was there and working late. It seems to me that maybe she was. I know that I typed some of it.

Q Did you type the first part?

A No, I didn't type the first part. I can see that. I am not that good. I don't think I typed it.

Q Did you in fact take the pages from an affidavit already prepared and strike through certain words, to wit "this affiant," and substitute the name "Joe Pressley," as appears in line 5 and various other places on page 3 of this affidavit?

A Without the collaborating testimony of Mr. Cognburn, I would decline to try to answer that.

Q What was your recollection?

342

A I don't remember. Maybe this is true, but I don't remember having done that. I am sure I copied it from somebody. I don't think they stood there and dictated while I typed it.

Q Well, my question specifically is did you copy it, or did you put into a typewriter a page already prepared, and strike through?

A No, no. I copied. I copied.

MR. REILLY: Will the Examiner indulge me one moment? I wish to refer to a transcript that is up on the witness table.

THE WITNESS: May I retract that statement, please? If it is not too late.

MR. REILLY: No, no, of course. We are seeking the truth.

THE WITNESS: I am looking at this, and I am trying to give you an intelligent answer. We determined that I typed the last three pages because of the neatness and the amateur work here, and it also looks like you could have a point, and I am not trying to ^{deny} ~~deny~~ that I didn't or did. I can see what you mean, where it has been X'ed out and Joe Pressley's name has been put in several places.

By the same token, I can't remember what the procedure was at the time.

BY MR. REILLY:

Q Well, isn't it a fact that Joe Pressley has been put in on page 3 in substitution in each case for the prior typed phrase "this affiant"?

343

A Yes, sir.

Q Does that refresh your recollection in any way?

MR. REILLY: I am sorry. If the witness gave an audible response to the last question, I didn't hear it, and whatever shake of the head he may have made would not be reflected in the record.

MR. FISHER: I think the witness forgot the question.

THE WITNESS: What was it?

MR. REILLY: Could the reporter read the question back, please?

(The question was read by the reporter.)

THE WITNESS: Well, I can't recall whether or not he discussed this affidavit, or whether it was already prepared when I got there. If I got there late, or if we waited for someone else to get there. And I think at the time, all four of us were present when the typing was done, but I am not clear, and I don't remember the procedure that we used.

BY MR. REILLY:

Q Is it possible, sir, that instead of your typing pages 3 and 4, you merely adopted pages 3 and 4 of another affidavit, and your typing task consisted of typing the necessary or the changes which appear here?

A I would say that it is possible that I typed it, and made a mistake, and then went back and corrected those places that are in question.

344

I remember typing at length. I don't recall just typing in a few names. I sat there for quite some time.

Q At the time you arrived at the meeting in question, with your attorney, Mr. Willson, Mr. Cogburn, and Messrs. Pressley, had any pages been prepared in advance? Were you given prepared pages?

A I don't remember. I don't recall.

Q All right. Let me try it another way.

This meeting took place in whose office?

A Mr. Willson's office.

Q Mr. Willson's office. Was this a single-room office, was it a suite of offices?

A A suite of offices.

Q All right.

How many typewriters were there in that office? As best you can recall, of course.

A Well, there was one general location for the typewriters, and that was where his secretaries were, and to my knowledge, it seemed like maybe two rooms were used. He had a study, or a library.

Q Was there a typewriter in that office?

A Could have been a typewriter there.

Q Where was the typewriter which you utilized?

A The typewriter that I used was, I believe, where the secretary sits. Out from his office, his personal office.

Q I see. All right, now let's take for the moment just the first two pages of this document.

How were they prepared?

A You mean were they prepared by the two attorneys? With the approval of myself and the Pressleys?

Q How were they drafted? How did they come into the typed form that appears in our docket here? Starting with the question, who dictated them, if they were dictated, or who drafted them in longhand?

A I don't remember.

Q And who typed them?

A Well, I admitted to typing some.

Q The first two pages?

A No, it doesn't look like my work. It is possible, but I don't think I typed it.

Q Was it typed in your presence?

A Yes, I am sure that if the lady worked late and did some typing on this, then it is apparent that she did, I was there.

Q And on the same typewriter you later utilized?

A Now there is a possibility that this secretary of his was extremely busy with other matters.

Q Is it a possibility, or is it a fact, sir?

A Well, that's just it. I remember some details there where it seemed like we had to set up in his library. And

346 whether she left or not, I don't recall.

Q I didn't mean to interrupt you.

A Or stayed there working, sir. See.

Q What time of day are we talking about?

A At night.

Q What hours?

A Well, five, six, seven o'clock in the evening.

Q Now what do you recall?

A Sir?

Q You see, you have been saying it is possible, it is possible. What is your recollection?

A Well, I remember going to his office.

Q Fine.

A And discussion, and I don't even remember what we discussed, but I know that there were four of us there. And after we finished our business, we went over to the court house. And that I did some typing. Nothing any finer than that.

Q Well, now, when you say you went over to the court house, you mean to Mr. Willson's offices in the --

A No, we went over to the court house with the Pressleys and Mr. Cogburn to record this or have something done, whatever it has got in the back, by the Deputy Clerk, General County Court.

Q What hour was this?

A That was later, when everything was completed. That

347 same night.

Q And approximately what hour?

A Oh, it could have been 10:30, 11 o'clock at night.

Q Is the Clerk's office in the County Court open at that hour?

A Well, he was there. He sure was. He was there. Whether by prearrangement, I don't know, but he was there.

Q Turning for the moment from the physical typing of Pressley Exhibit No. 2, and directing your attention to pages 3 and 4 of that exhibit, what did you personally contribute to the content of those two pages?

A Well, it looks like I contributed most all of the information there.

Q Those are your own words?

A No. These were the words of Mr. Cogburn, together with Mr. Willson. They both dictated this. I don't recall who dictated what, but I remember now that it was dictated by one or both.

I believe the way it was, one of them dictated it, and made the suggestion that if there was anything that he disagreed with, to stop him, and they worked it out together.

Q And in dictating, were they dictating from an affidavit previously prepared by Mr. Joe Pressley?

A Yes.

Q Now let's go back to the period April, 1960. The time

348 during which the application of Mr. B. E. Bryant --

PRESIDING EXAMINER: Excuse me, Mr. Reilly, are you leaving this exhibit?

MR. REILLY: Yes, I am, Mr. Examiner.

PRESIDING EXAMINER: Would you mind if I cleared up one point that is in my mind?

MR. REILLY: Not at all, no. .Not at all.

PRESIDING EXAMINER: Mr. Slatkin, will you look again at Pressley Exhibit No. 2, sir, with particular reference to page 2? Will you look at the last line of page 2? Have you read that, sir?

Do you notice that that line purports to start a sentence, and concludes on a comma. Is that correct, sir?

A Yes.

PRESIDING EXAMINER: Now will you look over to the top of page 3?

THE WITNESS: Yes.

PRESIDING EXAMINER: And that sentence is not concluded at the top of page 3, is it, sir?

THE WITNESS: That is true. .

PRESIDING EXAMINER: Does this suggest to you that at some time, there may have been a different page 3 than the one we now have?

THE WITNESS: It is possible, yes, sir.

PRESIDING EXAMINER: Is your recollection refreshed by

349 reading this?

THE WITNESS: Mr. Chairman, I was typing words more than I was reading at the time, and so I don't recall.

PRESIDING EXAMINER: Do you recall if at some time there was a page 3 which you or someone else found to be unsatisfactory?

THE WITNESS: No, sir, I don't recall.

PRESIDING EXAMINER: Thank you, sir.

* * *

Q Referring, sir, to the month of April, 1960, the period during which the application of Mr. B. E. Bryant was being prepared, you have told us that you went to Mr. Bryant's house on April 27, and assisted him in the preparation of application at that time.

Had you previously performed any or rendered any assistance to Mr. Bryant in connection with the preparation of this application?

A No.

MR. FISHER: I am sorry. I couldn't hear the answer.

THE WITNESS: No.

BY MR. REILLY:

Q I have not had an opportunity -- I use this as a predicate for the question I am about to ask, because I do not want to misstate yesterday's record, but Mr. Slatkin was present when Mr. Bryant testified, and I do recall Mr. Bryant indicating that Mr. Slatkin had assisted him, prior to his trip to Washington, when he acquired the services of Mr. Sam Miller.

350

And Mr. Miller had at that time indicated that there was much wrong with the application. I don't want to misstate, but I do recall turning and noticing your favorable expression at the time of Mr. Bryant's testimony.

A Well, there was no contact prior to that first meeting, the 27th.

Q And that was on April 27th. Was there any subsequent contact, before the filing of that application?

A Just the next morning on the highway.

Q On the highway.

* * *

355

VERNON E. PRESSLEY

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

* * *

356

Q Mr. Pressley, have you ever worked at station WWIT in Canton, North Carolina?

A Yes, sir.

Q Could you tell us when?

A From June 1954 to October 31, 1958.

Q What was your position at WWIT?

A I was Sales Manager.

* * *

359

Q Mr. Pressley, why did you leave station WWIT?

A Well, I was planning to file an application with the Federal Communications Commission for another station in Canton.

and I had been offered another job at WSKY in Asheville.

* * *

365

Q Did you have any conversations with Mr. Paxton concerning your application?

A Yes, sir.

Q When did that conversation take place?

A That was shortly after I had noticed my cut-off date in the Broadcast Magazine in the early part of April.

Q Under what circumstances did your discussion with Mr. Paxton come about?

A Mr. Paxton called me at my home one evening and asked me if I would come to his office.

Q Did you go to his office?

A Yes, sir.

Q Did anyone go with you?

A Yes, sir.

366

Q Who went with you?

A Joe Pressley.

Q Now, could you relate in detail all the circumstances of that meeting between Mr. Paxton, yourself, and Mr. Joe Pressley?

MR. BOOTH: Well, Mr. Examiner, I would object to the question as too broad. "Relate all circumstances," in effect, is telling the witness to start talking until further notice, and I think we should proceed by question and answer.

PRESIDING EXAMINER: Go ahead, Mr. Fisher, for a while,

at least. Let's proceed by question and answer.

BY MR. FISHER:

Q Where did the meeting take place?

A In Mr. Paxton's office at WWIT.

Q What was the nature of the conversation?

A Well, when we first went in, he talked about different employees that had worked there that I knew, and then he made the statement that if I would give him a letter stating that I would dismiss my application, that I could come to WWIT as Sales Manager and name my own salary.

Q Did you accept that offer?

A No, sir.

* * *

367 Q Did Mr. Paxton say anything else after that?

A Yes, sir.

Q What did he say?

A He made me another offer that he would sell me one-fourth interest in WWIT.

368 Q Did you discuss -- was there any further conversation on this aspect of your meeting?

A Yes, sir.

Q What was the further conversation?

A We got up and started to leave, and Mr. Paxton asked me how much under-the-table money that it would take to get me
369 to dismiss my application.

Q What was your response to that?

A I told him I would not do that under any circumstances;

* * *

370 Q Now who initiated -- was there any conversation between
you at this meeting?

A Yes, sir.

Q Who initiated the conversation?

A Mr. Paxton.

Q What did Mr. Paxton say?

A Well, when we met on the street, Mr. Paxton suggested
that we go into a furniture store; just across the street, and
we went in there, and he wanted to know what I had thought about
the propositions, and I told him -- he wanted to know if I had
thought them over, and I told him I had, and he wanted to know
371 what I had decided, and I told him I had decided against any of
the propositions.

* * *

379 Q Did your attorneys file any pleadings with the Com-
mission that you recall?

A Yes, sir.

Q Do you remember what that pleading was?

A Yes, sir.

* * *

380 Q What was that pleading, sir?

A A motion to enlarge issues.

Q Directed against whom?

A B. E. Bryant.

* * *

385

MR. FISHER: Mr. Examiner, at this time I would like to offer into evidence the motion to enlarge issues identified by this witness as having been filed by his attorneys, and if it suits your convenience, I could make copies of it and provide it for the record.

I believe that would make it Pressley Exhibit No. 4.

* * *

387

PRESIDING EXAMINER: All right, gentlemen, I understand your positions.

Yesterday, the Slatkin affidavits were received, because of their apparent relevance to the credibility question raised with respect to Mr. Slatkins' testimony.

I understand that a similar question is to be raised with respect to Mr. Pressley's testimony, accordingly, his affidavit will be received for the same reason that Mr. Slatkin's affidavits were received.

388

With respect to the petition to enlarge issues itself, and the other attached affidavits, I think that Mr. Fisher makes an excellent point: That it is essential background material to come in for the limited purpose which he has described.

The order of designation refers to the petition to enlarge issues, and its attached affidavits. It might be helpful at some future study of this record if the pleading itself were available for perusal, so for the limited purpose for which it has been offered, it will be accepted.

The proffered document is identified as Pressley Exhibit No. 4, with the stated qualifications, it is received in evidence, and Mr. Fisher, you are granted leave to withdraw it for the purpose of reproduction;

(The document referred to was marked for identification as Pressley Exhibit 4 and received in evidence.)

MR. BOOTH: In other words, it is received for the limited purpose of showing what was filed with the Commission, and for no other purpose.

PRESIDING EXAMINER: Exactly, sir.

MR. FISHER: Except for Mr. Vernon Pressley's affidavit.

PRESIDING EXAMINER: Except for Mr. Vernon Pressley's affidavit.

MR. BOOTH: And for what purpose is that received, sir?

389 PRESIDING EXAMINER: And that is received for the specific purpose of showing that Mr. Pressley did make that statement under oath to the Commission, on the time that on the face of the document he purportedly made it.

PRESIDING EXAMINER: I might say that if anybody wishes, that if any of the other affiants testify in this hearing, and that their credibility becomes an issue, that I will hear motions to broaden the receipt of their affidavits attached to that motion to enlarge issues.

BY MR. FISHER:

Q Mr. Pressley, the material you provided your attorneys in connection with this motion, and in connection with the proceedings in which the motion was made, was that the result of your own investigation?

A Yes, sir.

Q Could you name the persons you have contacted as a part of your investigation?

Q My question was, what persons did you contact as a part of your investigation?

A Mr. Edwards, Mr. Slatkin, and of course, Joe gave me an affidavit.

* * *
CROSS-EXAMINATION

BY MR. BOOTH:

Q Did you tell either Mr. Middleton or Mr. Edney at any time prior to the time you left WWIT on October 31, 1958 that you were going to file an application for a second station at Canton, or would establish a second station in Canton?

A Before I left the employ of WWIT?

Q Yes.

A To the best of my knowledge, I never told anyone that I was going to file. Surely I didn't tell Mr. Middleton or Mr. Edney at that particular time.

Q Did you threaten to file an application if certain terms and conditions of employment or sale which you had

414 offered or which you had suggested were not met?

A I didn't threaten. I don't like to threaten anyone, sir.

Q So the answer to my question is no?

A Well, I am pretty sure that I didn't threaten to do it.

* * *

458 Q When the litigation against Mr. Slatkin was initiated, did you not sign an application for an order to authorize the adverse examination of Mr. Slatkin?

A Yes, sir.

Q And an order was issued by the court authorizing the adverse examination of Mr. Slatkin. Is that correct?

A Yes, sir.

Q And then Mr. Slatkin went to a court in another county, in Buncombe -- B-u-n-c-o-m-b-e -- County, Asheville, and obtained this restraining order.

A It is in the same county.

Q Is it in the same county? All right. At least a restraining order was issued.

A In Buncombe County, yes, sir.

Q And then, well, was your suit initiated in Buncombe
459 County or Haywood County?

A I believe it was initiated in Haywood County. Now I am not sure.

Q Now after Mr. Slatkin had executed his affidavit of

September 9, 1961, did he not appear as a witness on your behalf in your hearing in December of 1961?

MR. FISHER: Objection. It calls for a legal conclusion.

PRESIDING EXAMINER: I don't think so.

Overruled.

THE WITNESS: Mr. Slatkin appeared as a witness in my hearing?

BY MR. BOOTH:

Q Yes.

A Yes, sir.

Q And he was called as a witness in support of your application?

A He just came voluntarily.

Q And was he presented as a witness for you or for the Broadcast Bureau, if you know?

A Well, he was a witness.

* * *

460 MR. BOOTH: I would like you to take official notice of the fact, please, Mr. Examiner, that Mr. Slatkin was called as a witness for Vernon E. Pressley and the direct examination was conducted by Mr. Pressley's attorney, Mr. Max Cogburn.

PRESIDING EXAMINER: Any objection?

MR. FISHER: No objections.

PRESIDING EXAMINER: Mr. Reilly?

MR. REILLY: No objection.

PRESIDING EXAMINER: Notice is taken.

BY MR. BOOTH:

Q Now, after Mr. Slatkin appeared as a witness at your hearing in December, 1961, were any additional steps taken by you or on your behalf to prosecute your litigation or your suit against Mr. Slatkin?

THE WITNESS: Well, Mr. Cogburn just let the restraining order stand as was, to my understanding.

461

BY MR. BOOTH:

Q And was not a judgment of non-suit in Mr. Slatkin's behalf entered by the court?

A I just don't remember.

* * *

463

Q Now Mr. Pressley, there is also testimony by Mr. Bryant in this proceeding concerning litigation or a suit which you brought against Mr. Bryant.

Did you bring such an action or bring an action ^{against} ~~against~~ Mr. Bryant which resulted in the taking of his adverse examination?

A Yes, sir.

Q And you signed the application for the documents necessary to institute that proceeding?

A Yes, sir.

Q And was adverse examination of Mr. Bryant held?

A Yes, sir.

464

Q Following the adverse examination of Mr. Bryant, did you or did anyone on your behalf take any further steps to prosecute your suit or your litigation against Mr. Bryant?

A We renewed our whatever it is in court, a time or two.

Q Well, what you have reference to, do you not, is a motion for extension of time to file your complaint, because there was a delay in obtaining Mr. Bryant's signature to the adverse examination?

A I don't know whether I understand the question or not.

Q After the adverse examination was held, were you not then to file your complaint in the litigation against Mr. Bryant?

A Sir, I am not familiar with the legal procedure.

Q All right.

Let me ask you this, then. I can understand, Mr. Pressley. I am not faulting you for not understanding the procedure.

That suit of yours against Mr. Bryant never came to trial, did it?

A It has not.

Q It has?

A It has not.

Q Oh, it has not. And eventually, the court issued a judgment of non-suit for lack of prosecution on behalf of Mr. Bryant, did it not?

A I am not familiar with that. I know we renewed our -- renewed it. A time or two, or three times.

* * *

476 Q Were you present in the hearing room in this proceeding the other day when Mr. Slatkin testified?

A Yes, sir.

Q Do you recall that Mr. Slatkin, the other day, recanted or retracted certain statements made in affidavits which he had submitted in connection with the proceeding involving your application in Docket 14007?

A I am not sure if I followed you all the way through your question, sir.

Q Do you recall hearing Mr. Slatkin testify that certain testimony he gave in the hearing on your application was not correct?

To help refresh your recollection, that testimony was about the \$50 payment alleged to have been made to him by Mr. Bryant, in cash, and a \$50 payment alleged to have been made to him by Mr. Paxton or WWIT by way of check?

477 A You mean in this hearing he testified differently than he did in my proceeding about that?

Q Yes.

A I remember him testifying to that; yes, sir.

Q Do you also remember his testifying in this proceeding that certain statements concerning the \$50 payments which he had made in affidavits were incorrect or false?

A That certain statements he had made like that it was for Tempo, but wasn't? Is that what you are referring to?

Q Yes, and that he had received the \$50 in cash from Mr. Bryant when, in fact, he had not done so, according to his later testimony?

A I heard him testify to that.

* * *

480

Q Did you offer Mr. Medlin employment as manager of station WPTL within the last four months?

MR. FISHER: Objection.

PRESIDING EXAMINER: Overruled.

THE WITNESS: We had talked about it. That was right after I had major surgery, and I was still, if I could find a good manager, still like to have one.

BY MR. BOOTH:

Q In your discussions with Mr. Medlin, did you also ask him what he knew about the so-called agreements relating to the payments for the purchase of the stock of Western North Carolina Broadcasters in 1953?

MR. FISHER: Objection, Mr. Examiner. There hasn't been any testimony about Mr. Medlin's conversation concerning the contracts. We didn't call him as a witness. If Mr. Booth has some rebuttal testimony, he can certainly call him.

MR. REILLY: I gather that he is laying a foundation, sir.

MR. FISHER: He would be the best evidence.

PRESIDING EXAMINER: The objection is overruled.

481

THE WITNESS: Sir, Mr. Medlin coming to see me and talking about the possibilities of employment at WPTL sure had nothing to do with whether I would want any evidence out of him. We talked about it a little while. In fact, I asked him if he remembered how much their group, or what it was, and he says,

well, it seemed like it was over \$100,000 that we paid for it.

I didn't want his --- had no intention of ever calling him as a witness or anything like that. We just casually talked about it.

BY MR. ECOTH:

Q In your discussions, did Mr. Medlin ever say that anything he might testify to in this hearing would not be beneficial to your interest?

A I don't remember him saying that, sir. I surely don't.

* * *

487 Q Now, turning to another subject, Mr. Pressley, when Mr. Edwards called you in the summer of 1960, I think you said it might have been July. In any event, in your mind it was before August of 1960.

Did he originally offer you his affidavit concerning the filing of the B. E. Bryant application --

A No, sir.

Q Let me finish my question first, sir.

488 -- if you would pay him an amount of money, specifically, \$1,154?

A He said that he had about \$1,154 in it, and that he would give me an affidavit, if it was my understanding, if I would reimburse him for what he had in it. He wanted to get it off his conscience, and wanted to get his money out of it, too, if he could.

Q That was the initial basis of his approach to you. Is that right?

A Now, these may not be just the exact words that Mr. Edwards said, but that is the significance of it; that he wanted to get it off of his conscience and he had about \$1,150-some in the application.

Q Did he tell you at the time of that conversation how he came to have \$1,150-some odd in that application?

A No, sir. To the best I remember it, he didn't tell me how he came to have that much money in it.

Q Or what it was for?

A No, sir.

Q Did he subsequently tell you?

A Well, now, I don't recall whether he told me what he -- how he came about having that much money in it, whether it was for time and maybe some expense that he had incurred driving, and things like that. That I just don't recall, but he said that he had that much money in it.

489 Q Well, since you have put certain assumptions in, your testimony, however, is that, no, he did not tell you, or you do not recall his telling you what this might have been for.

A I really don't recall it. I am sorry, sir.

* * *

489-A Q Of 1960. Now, you have also testified that it was not until approximately the first of May 1960 that you found it desirable to go to the District Attorney's office and report

your conversation with Mr. Paxton. Is that correct?

A Yes, sir.

Q Did you wait until after you had learned that Mr. Bryant had filed an application on 920 on April 29, 1960?

A Did I wait until after I had learned it was Mr. Bryant?

Q That an application had been filed by Mr. Bryant before you --

A No, sir; I believe I went -- I believe I went to the District Attorney before Mr. Bryant's application was announced as filed.

Q Did you know -- complete your answer. I did not mean to interrupt you.

A Now I am not sure. I am not sure about whether it was before or after I heard. Maybe if I knew the date of Mr. Bryant's application --

* * *

491

Q Now was the first that you learned of the filing of the Bryant application the news wire, or had you learned of its filing or imminent filing prior to that release over the news services?

A I had learned that it was being filed by the 29th before it came out on the news wire.

Q Yes. In other words, you had learned that an application was being prepared for filing, prior to your going to the district attorney's office and making the complaint against Mr. Paxton?

A I had learned that -- I am sorry. I am getting a little tired.

Q Well, please take your time, sir. I don't mean these questions to come too fast.

A Could I hear the question again, please?

MR. REILLY: Of course, let it be read back.

(The pending question was read by the reporter.)

THE WITNESS: Yes, sir, I had learned before I went that it was being filed, before I went to the district attorney's office.

* * *

528 Q It was following the receipt of Mr. Bryant's petition in opposition to your motion, was it not, that you instituted suit or legal proceeding against both Mr. Bryant and Mr. Slatkin?

A Yes, sir.

* * *

533 Q Is it not a fact that the reason the Slatkin suit or action was not prosecuted is because Mr. Slatkin had executed an affidavit on September 9, 1961, which was prepared in your presence and in the presence of your attorney?

A There again I was acting on the advice of Mr. Cogburn.

* * *

535 Q Was not the second time you met Mr. Slatkin on September 9, 1960, when you met in the offices of Attorney ^{Wilson} ~~Wilson~~ for the purpose of preparing Mr. Slatkin's affidavit of that date?

A I am not sure but I think that that is the next time
536 that I saw him.

Q Did Mr. Slatkin ever ask you for money?

A No, sir, not just come right out and ask me for money.

Q Did he ever tell you that he needed money?

A Well, I remember a thing that he said and I just don't know what he meant by it but he made the statement that Mr. Paxton needed a friend, Mr. Bryant needed a friend, and that I needed a friend and he needed some money. That is the only thing that I remember him saying.

* * *

537

Q Did you obtain a telephone call from Mr. Slatkin in April of 1961, almost a year after the Bryant application was filed in which he told you that he needed money?

A Now I believe that it was in this telephone call that I received from him that he stated this friend situation.

Q Did you get the idea from Mr. Slatkin's telephone call that he was offering to sell you an affidavit?

A Well, really I just didn't understand what would prompt him to remark like that.

* * *

604

JOE B. PRESSLEY

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Pressley, will you state your full name, address and occupation for the record, please?

A Joe B. Pressley, 11 Shady Drive, Canton, North Carolina. Champion Paper. I am employed at Champion Paper.

Q What is your relationship to Petitioner Vernon E. Pressley?

A Brother.

* * *

610 Q Mr. Pressley, did you relate the details of your conversation to Mr. Vernon E. Pressley?

A Yes, sir.

* * *

611 Q What did you tell Mr. Pressley about your conversation with Mr. Slatkin?

MR. BOOTH: I object, Mr. Examiner, unless the witness is cautioned again not to get into hearsay matters.

MR. REILLY: This takes it one step further away.

MR. FISHER: Mr. Examiner, the witness can certainly testify to the fact and this is a fact as to what he said to someone else.

MR. BOOTH: You are not offering this for the truth of the matter?

MR. FISHER: I am offering it for the fact that he so stated.

PRESIDING EXAMINER: I am going to receive this, gentlemen, in that it may help us to understand some of the testimony that Mr. Vernon Pressley has given us and explain the motivations for his action.

I am receiving it, though fully aware of its hearsay nature and that Mr. Joseph Pressley was only repeating hearsay that he had heard.

To my mind, it could not possibly prove the truth of the matter asserted in the conversation. The objections are overruled.

THE WITNESS: What was the question?

BY MR. FISHER:

Q The question is, what did you relate to your brother concerning your conversation with Mr. Slatkin?

A I related to him the full conversation I had with Mr. Slatkin. Do you want me to go into detail?

Q Would you, please. Tell us as you remember what you told him.

A That it was my understanding in this conversation I had with Mr. Slatkin that it looked like there might be another application filed on 920. Am I permitted to use the "crooked"

Q What did you tell your brother concerning that conversation?

MR. BOOTH: I assume this has the same limitation as the other, it is not being received for the truth but only for the purposes of knowing what was said?

PRESIDING EXAMINER: That is correct. I understand you are objecting, Mr. Booth, and I am overruling you for the same reason.

MR. BOOTH: Yes. I wanted to be sure that the ruling continued throughout this line of questioning.

PRESIDING EXAMINER: Yes.

* * *

518 Q What did you report to your brother Vernon concerning your conversation with Mr. Slatkin on Thursday?

A I reported that there had been an application filed out on the Wednesday before and the one that was ^{filled} ~~filed~~ out in Asheville, North Carolina, and the ones present at this day of ^{filling} ~~filling~~ out of the application were Eugene Slatkin, Billy Bryant, Dalton Paxton, Hal Edwards, and Joe Cole; that Mr. Slatkin was the one who had did the paper work on the application, at the instructions of Dalton Paxton. He had received a check of \$50 in payment for his work on the application.

He had also saw a \$500 check passed from Mr. Paxton to Mr. Bryant.

* * *

621 MR. BOOTH: I assume, Mr. Examiner, that the hearsay statements are not admitted for the truth?

PRESIDING EXAMINER: That is correct, sir.

This is only to show what this witness was told.

MR. BOOTH: Thank you, sir.

622 Q Did you ^{attend} ~~attend~~ any conversations with Mr. Paxton concerning the application of your brother Vernon?

A Yes, sir.

Q When did that conversation take place?

A The early part of April I attended a conversation.

Q What year, sir?

A 1960.

Q How did that conversation come about?

A I was at home and I received a call from Vernon. He said that Mr. Paxton had called him and wanted him to come up to the radio station, that he wanted to "talk over something with me." He asked me if I would go along with him up there, if I was doing anything, he would like me to go up there with him. He didn't know what Mr. Paxton wanted.

Q Were you there throughout the entire conversation?

A Yes, sir.

Q Could you relate the details of that conversation?

A We arrived there pretty close to the same time. I drove my car and he drove his. I didn't know how long the meeting might take and I was working at 7 a.m. to 3 p.m. shift on that particular day and I didn't want to get into a meeting where I would be tied up for quite a bit because I always like to go to bed fairly early when I am working this shift.

We went in and we sat around a while. I might have talked some to Dalton there, I might have gotten a bit in on some conversations, one thing or another, but I do remember the statement that Mr. Paxton made that he would like for Vernon, if he would come back to WWIT as commercial manager, he would like to have him come back.

He stated that if he would come back he could name his own salary and if he would give him a letter in writing that he would withdraw his application he would put it in his safe and nobody would know anything about it but us.

I am pretty sure that Vernon told him that he wasn't interested in anything like that. It seemed like there was a conversation, maybe, about Vernon buying a part interest, Dalton wanting to sell him a part interest in the station, maybe a fourth of it or something of that kind.

624

I don't remember the exact figures that were made or anything because I was not actively participating in the conversation. I was just sitting in the office with them.

There was another ultimate there. I don't know, they probably talked around there maybe for an hour or hour and a half or so. I know we were getting ready to leave when Dalton asked him how much under-the-table money it would take for him to withdraw his application.

I don't remember just what Vernon said but I know he told him that he wouldn't be interested in nothing like that. We left.

That was the end of this particular meeting that I was in.

625

Q Mr. Prossley, was this your last conversation with Mr. Paxton on that subject?

A I was in another, I guess you might call it a little meeting or something. I heard the discussion again.

Q Who attended that meeting?

A Me and my brother and Dalton Paxton.

Q Where did that meeting take place?

A This was in a furniture store in Canton.

Q How long after the first conversation with Mr. Paxton
626 did this second conversation take place?

A It wasn't long; it could have been the same week now.
I am pretty sure maybe it was in the same week.

Q Do you know whether it was more than a week?

A I don't believe it was.

Q Could it have been?

A It could have been within a week I think.

Q Now what were the details of your discussion with
Mr. Paxton at that time?

A We were in town and happened to run into Mr. Paxton
in front of the furniture store. It seemed like he wanted to
maybe talk a little bit there with Vernon. I know we went into
the furniture store and sat down.

At this particular meeting it seemed that he was wanting
to know whether Vernon was going to accept any of these offers
that he had made in this meeting a few days before. That is
about the extent of this particular conversation. I don't
think I talked any one way or the other.

Q Did your brother accept any of the offers?

A No, sir.

* * *

Q Did you discuss your brother's interest in buying
629 shares in the licensee of WWIT with anyone related to WWIT?

A I believe I did.

Q Who is that person?

A Bevo Middleton.

Q Is this the person also known as Beverly Middleton?

A Beverly Middleton, yes.

Q When did this conversation take place?

A It was sometime after Vernon had left WWIT. On my own I drove over to Hendersonville.

PRESIDING EXAMINER: You had not been authorized by your brother?

630 THE WITNESS: No, sir, I had not. I don't think I even told him that I had been over there on this particular trip. I went over to the offices of WHKP in Hendersonville. I met Mr. Middleton and Mr. Edney and Mr. Gilmore

I had known that Vernon had had some discussion with them on buying WWIT. He may have told me that he had made them an offer on it of \$75,000. I talked some to Mr. Middleton. I am pretty sure that Mr. Edney was in and out there because I knew all three of these gentlemen, and maybe Mr. Gilmore.

I thought maybe that if they might be interested in selling or something that maybe I could get four or five and we could buy WWIT.

BY MR. FISHER:

Q You say we. Whom do you mean?

A I was thinking maybe that Barry Medlin that worked up there. As far as I know I hadn't talked any with Barry Medlin, but maybe get three or four -- if he would sell and I know he

was asking \$103,000 or whatever it was, he finally told me he had told Vernon what he wanted for it.

Vernon said he was asking \$75,000 and he turned it down. I thought there might be something inbetween there where he might arrive at some figure but I was over at Hendersonville and talked with him personally.

Q- What was your personal interest in making this trip and having this conversation?

631 A At that particular time I had heard that WWIT might be sold and I thought maybe I might be a little bit interested in buying some stock in WWIT. But there wasn't nothing that came out of that particular meeting. He still stuck to his price. He might have indicated that he already had some buyers for it or something.

* * *

671 CROSS-EXAMINATION

BY MR. BOOTH:.

* * *

673 Q You have testified to a meeting which you stated was
674 held with Mr. Watts in his store on April 29, 1960. Have you been in Mr. Watts' store at any time since that visit?

A Yes, sir.

Q Frequently or occasionally?

A Oh, maybe one or two times. I had one of these electric mixers, or something that broke, and I took it in and he sent it off somewhere for it to be repaired. Now that's the only -- one other time, I bought a used refrigerator from

him, to, well, I don't know whether I bought it directly from him or not. I believe I bought it from Mr. Sanley, and took it to a fishing cabin that I had out at Hiwassi Lake. This was a refrigerator, and it and this electric mixer, I believe, was the only times that I was over in his store after this conversation.

Q And when did you buy the refrigerator?

A Let's see. It was sometime -- about '61, somewhere along in there, '62.

Q During the summer months?

A I am pretty sure it was during the summer months, yes, sir.

Q Now have you ever been in Mr. Watts' store during which your brother Vernon was also present?

A Not that I recall, no, sir.

* * *

675 A There could have been someone out front. But this conversation I had with Mr. Watts was kind of around in the little office place of a thing.

Q In the back of the store?

676 A Well, it is not plumb in the back end of the store, I don't think. There might be a little space left from there to the back.

Q But the display area of the items being sold is between the front door and the office?

A Yes, sir.

Q Do you know whether anyone was present who might have overheard your conversation?

A I don't -- I am sure that there wasn't no one that could have overheard the conversation, no, sir.

Q Was your voice and Mr. Watts' voice kept low, or was it loud?

A Well, about like a usual conversation. I don't think we was either too low or too loud. We just talked.

* * *

Q Mr. Pressley, a number of times in your testimony yesterday you stated in effect that you understood that an application was going to be filed to block your brother's application. In using the term "block" -- or how did you use the term "block", or what did you understand a block application to be?

A I wasn't too familiar with radio, and it seemed like that was the word that was actually going around, and Mr. Slatkin had used the word "block".

Now, whether it was to keep or try to keep my brother from getting his application, or anything like that, I didn't actually know that that was the purpose, for I don't have any knowledge of the FCC's rules and regulations, and things like that.

Q In other words, at the time you reported to your brother that there was going to be a block application filed according to what Mr. Slatkin had told you, it was your under-

standing that there was going to be an application filed which would conflict with your brother's application?

A Well, block, that word "block" was --

Q What was your understanding at the time of the word "block"?

A Try to keep him from getting one.

Q For the sole purpose of trying to keep your brother from getting a station?

A Yes, yes, I guess it would be that effect. I mean, that would be my thinking now.

Q All right. Would you include in your definition of a "block application" an application filed in good faith for the purpose of establishing a new station in Asheville, North Carolina?

682

* * *

PRESIDING EXAMINER: Read it back.

(The pending question was read by the reporter.)

THE WITNESS: Well, it all depends, kindly, on under what circumstances that particular application would be filed, I would think.

By Mr. Booth:

Q Well, did you know in the week preceding the filing of the application that the circumstances were such to make the application a block application in your mind and under your definition?

A I didn't know anything about it the week before this

particular week that it was filed or prepared. I didn't -- another application, I hadn't heard of anything pertaining to that.

* * *

683 Did you know Curtis F. Stanley?

A Yes, sir.

Q Mr. Pressley, who is Mr. Stanley?

A He is an employee of Mr. Watts.

Q For how long have you known Mr. Stanley?

A I have known him, oh, since '49, anyhow. I will say that long.

* * *

688 Q Do you feel very strongly about your brother and his business opportunities?

A Yes, I do, sir; yes, sir.

Q So that anybody who opposed your brother, you felt was opposed to you and to your family?

689 A Well, no, not directly, as far as my concern would be, no, sir, I don't, but probably something that would be opposed to him, you know, I would feel, I would be a little concerned about anything like that, yes, sir.

* * *

690 SIDNEY A. WATTS

was called as a witness and, after being first duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Watts, would you state your full name and address

for the record, please?

A Sidney A. Watts, 108 High Street, Canton, North Carolina.

Q What is your occupation, sir?

A Businessman.

Q What is your function and role in Western North Carolina Broadcasters, Inc.?

A President of the corporation.

702 Q Did you, all the six of you, I mean, the five of you named and yourself, decide jointly to buy 92 percent of the stock of Western North Carolina Broadcasters, Inc.?

A Yes, sir.

Q Who conducted the negotiations for the purchase of those shares?

703 A Barry Hedlin.

Q Did you have any role in the negotiations whatsoever?

A Not only in my purchase of my own stock.

Q Now who did you buy these shares from?

A From Bevo Middleton, and -- well, he was a principal stockholder, and Kermit Edney.

Q Is this Bevo Middleton also known as Beverly Middleton?

A Yes, sir.

Q Do you know who conducted the negotiations for the stock purchase from the seller's side?

A Bevo Middleton, Beverly Middleton.

Q Did Mr. Medlin negotiate all the terms or did you have a chance to influence his negotiation in any way?

A He handled all the terms.

* * *

Q What did you ultimately wind up buying that block of stock for?

A \$112,000.

* * *

Q Now did you actually read the contracts concerning the sale of the stock?

A I don't believe so. Not completely, or in its entirety.

Q Now do you recall why you didn't read the contract that involved substantial sums of money?

A Well, we had an attorney at the time, and I had my own CPA to check out the books at the station, and everything seems to be in order, so I don't recall ever reading the contract in its entirety.

Q Would you have noticed if the contract for the so-called consulting agreement contained a provision concerning interest?

A Well, I never read it that much, and just to my knowledge, I don't think it did.

Q Have you had occasion to read that contract again since that time?

A No, sir.

* * *

760

Q Did you find out about Mr. B. E. Bryant's application any time in May, 1960?

A To my knowledge, sir, I don't think so.

Q Do you remember where Mr. Paxton was, to the best of your knowledge, on April 29, 1960?

MR. BOOTH: I would object, Mr. Examiner, as to whether he remembers now or on some other date. Only for that purpose. The question is a little bit vague.

PRESIDING EXAMINER: You are asking if he remembers now, aren't you, Mr. Fisher?

MR. FISHER: Yes.

PRESIDING EXAMINER: Overruled.

THE WITNESS: On April the 29th, 1960, I was told that he was in Washington.

PRESIDING EXAMINER: Who told you, Mr. Watts?

THE WITNESS: Mr. Paxton.

PRESIDING EXAMINER: Thank you, sir.

BY MR. FISHER:

Q When did Mr. Paxton tell you that he was in Washington on April 29, 1960?

A After he came back.

Q Did he tell you about his trip before he undertook that trip?

A No, sir.

261. Q Did you know the purpose of this trip?

A No, sir.

Q Do you know today?

A No, sir.

Q Do you know who accompanied Mr. Paxton to Washington,

D. C.?

A Not personally, no, sir. Only what I have heard to
on the stand, sir.

Q When did you first get acquainted with Mr. B. E.
Bryant?

A After the hearing² in 1961.

Q Did you ever hear about Mr. B. E. Bryant or his appli-
cation before that hearing?

A Sometime before the hearing, yes, sir.

Q Did you know Mr. B. E. Bryant, or did you know about
Mr. B. E. Bryant's application on or about April 29, 1960?

A No, sir.

* * *

55 Q Did you ever discuss with Mr. Paxton whether you should
pay for the stock that you were purchasing in WWIT by means of
a consulting contract?

A Before or after?

Q Before you actually executed the consulting contract?

A Not to my knowledge, sir.

Q Did you ever discuss the consulting contract at all
with Mr. Paxton before you purchased?

A Not to my knowledge.

Q Before you purchased the WWIT shares?

A Not to my knowledge, sir.

PRESIDING EXAMINER: Mr. Watts --

THE WITNESS: Yes, sir.

PRESIDING EXAMINER: -- you have frequently used the expression "not to my knowledge." By that, do you mean not to your recollection, sir?

THE WITNESS: Yes, sir.

* * *

779

Q Did you have any understanding as to how far the group was willing to go in paying for that station or for that amount of stock?

A No, sir, I had no understanding.

Q Do you know why the consulting contract was proposed at all?

A Well, I suppose that it was proposed to help pay for the station.

780

Q I understand that, sir, but do you know why the payment for the station was to be made in that fashion?

A Not really, no, sir. But to my thoughts, it was just probably the common procedure. That it would be handled that way. My thought was that it would be a very good deal to be handled that way, because we could get some first-hand knowledge of running a radio station.

Q Were you aware of any tax advantage of that sort of

arrangement?

A Never thought of it that way, sir, in tax advantages.

* * *

82 Q Mr. Watts, did you ever become aware whether the FCC application form contained a question asking in substance what the consideration was for the transfer of the stock?

A I understand that there is such, but my knowledge is -- I am just not sure that it is on there, sir, but I have been told that it is, now. I became aware of this during the
83 last hearing that we had, in 1961.

Q Now, in light of the knowledge that you gained during the hearing in 1961, did you make any inquiries as to what reports were made by your corporation to the FCC?

A We conferred with our attorney on that, sir.

* * *

88 Q Do you know whether you have seen the transferees' portion of that transfer application, sir?

Do you understand my question?

A Repeat it.

Q Do you know what a transferee is, sir?

A That is a purchaser.

Q That is correct. Did you read the purchaser's section of the transfer application, sir?

89 A Not to my recollection, sir.

Q But you did see some portion of the application. Is that correct?

A I think it is most likely that I did, sir.

PRESIDING EXAMINER: If you don't remember, please tell us that, Mr. Watts, because we would like to know what it is that you remember, and what you are just assuming, sir.

THE WITNESS: Well, I don't remember reading any of it, but I don't want the fact to remain that I did. I possibly may have, sir.

* * *

795 Q Now, you testified before that you knew that Mr. Paxton was in Washington, D.C., on April 29, 1960. Did Mr. Paxton call you from Washington, D.C.?

A I testified ---

Q On that day?

A I testified that I did not know that he was in Washington on April the 29th, that I knew after he came back to town where he was.

Q I am sorry. I didn't mean to mislead you.

* * *

801 Q Who was your Washington attorney representing you?

A Mr. Lovett.

MR. BOOTH: For the record, would that be Elliot Lovett?

THE WITNESS: It was.

By Mr. Fisher:

Q Were you in contact with Mr. Sam Miller in 1961?

A I don't recollect of being in contact with him, sir.

Q Would you remember if you were?

A I would assume that I would remember. But I don't know the man.

Q Do you know whether Mr. Paxton was in contact with Mr. Sam Miller?

A No, sir, I don't. * * *

Q Now, did you know at the time the transfer of control application was filed with the FCC that the consulting contract was not filed with it?

A No, sir. In one word, I don't recall. I am too vague whether it was filed with it or not. Since that time, I found out that it wasn't, and that it was filed later, so I would hate to say yes or no on that subject. * * *

Q Did you ever have any conversation with Mr. Joe Pressley concerning the application of his brother, Vernon Pressley?

A I had a conversation with him. I don't believe that too much of his brother's application came into the conversation.

Q What was the subject matter of that conversation?

A On this time that I am speaking of, --

Q What time are you speaking of, sir?

A On April the 29th, 1959. His brother was with him.

Q Where did this meeting take place?

A Up in front of my store, inside the building.

Q What was said?

A Pretty hard to recollect what was said. But he asked me if I -- he asked me where Mr. Paxton was. I told him I didn't know, and he asked me if I was going to fight his appli-

cation. I told him if I could fight it legally, if the FCC asked me anything, that I would definitely try to help them there.

MR. BOOTH: Mr. Examiner, I would like to move that the answer be stricken, and object to the question, only for the sole purpose of -- only because the word "he" was used, and I believe in the previous answer, the witness had said that his brother -- Joe and his brother was present, and I just want to make sure who "he" was.

812

PRESIDING EXAMINER: If Mr. Fisher doesn't clear it up, I am sure you will on cross-examination, Mr. Booth.

Go ahead, Mr. Watts.

BY MR. FISHER:

Q Now, who asked you that question, sir?

A Joe Pressley.

Q You said that his brother was with him. Was that his brother Vernon?

A Yes, sir.

Q Did his brother Vernon say anything at all?

A Well, not to my recollection. He more than likely did, but Joe's the talker of that outfit.

Q How far were you standing from Mr. Vernon Pressley during that conversation?

A Two to three feet.

Q Did you have any difficulty recognizing him?

A No, sir.

Q Did you have any difficulty recognizing people back at the time this conversation occurred?

A No, sir.

Q Now I don't want the record to remain unclear. I think you testified that this was April 29, 1959, and --

MR. REILLY: 1960.

MR. FISHER: I think his testimony was '59, and I would like to correct that, if it is in error.

THE WITNESS: It was on the day that his application was to be considered by the FRC, or the cutoff date. If that was April, 1960, then I stand to be corrected on that.

* * *

Q Now on that date, did you know either Vernon or Joe Pressley, before they appeared in your store?

A Oh, yes. I have known them for -- at that time, probably 30 years.

Q You knew -- did you know both of them?

A Oh, yes.

Q How long did this conversation take?

A Not long. Maybe five minutes.

* * *

Q Did you, yourself, at any time in 1960, take any steps to prevent or delay the grant of Mr. Vernon E. Pressley's application?

A No. No, sir.

* * *

821 Q Did you meet with Mr. Bryant in 1960?

A No, sir.

Q Did you know about Mr. Bryant in 1960?

A No, sir.

Q Did you meet with Mr. Bryant in 1961?

A I -- the first time I met Mr. Bryant was after the hearing in 1961.

* * *

CROSS-EXAMINATION

831

By Mr. Reilly:

* * *

832 Q Now, if we could go to Mr. Fisher's questions this morning, which relate to the period of time when he was asking you about the Vernon Pressley note, held by H.N. Pressley, and what the reasons you might have for wanting to purchase that note, one of his questions, or several, perhaps, bore on the matter of whether you knew at that particular time that there would be an FCC hearing in connection with Mr. Vernon Pressley's application.

Now, with that as background, my question is: At that particular time, was Western North Carolina Broadcasters, Inc., represented by Washington counsel?

Did you have a Washington attorney at that time?

A We have always had a Washington attorney, since we have been on the air, since we bought out the other members of the corporation.

We have had Elliot Lovett as our consulting attorney.

* * *

DALTON PAXTON

was called as a witness and, after being first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Paxton, will you state your name and address
for the record, please?

A Dalton Paxton, 68 Poplar Street, Canton, North
Carolina.

Q What is your occupation, sir?

A I am manager of radio station WWIT.

Q How long have you been the manager of WWIT?

A Since early 1959.

Q Are you a stockholder of Western North Carolina Broad-
casters, Inc.?

A Yes, sir.

Q Are you a director?

A Yes, sir.

Q Are you an officer?

A Yes, sir.

Q What is your office, sir?

A Vice president.

Q Did you have any role in the negotiations leading to
the purchase of WWIT stock?

A No, sir. Pardon me, sir.

Q Sorry -- that led to the assumption of control of yourself, Mr. Watts, and four others of the licensee of WHIT?

MR. BOOTH: Well, Mr. Examiner, I would object to such a broad question as "any role." I have no objection to what he did, what he himself did, but just "role."

BY MR. FISHER:

Q Would you please take my long question and substitute in it what did you do, in the negotiations for the purchase of that stock?

A I was not involved in the negotiations.

Q Were you aware of the negotiations while they were being conducted?

A I knew that there was negotiations going on, yes, sir.

855 MR. BOOTH: I can't hear you. Please speak up.

BY MR. FISHER:

Q Who was the organizer of the group of the six persons?

A Barry Medlin.

* * *

Q Did you ever meet with the other members of the group in 1958?

856 A In December, when we took control, we met.

Q Was that the first time you met all the other members of the group?

A Yes, sir.

* * *

Q How long have you been a resident of Canton?

A Since July, 1959.

Q What was your occupation in July, 1959? In Canton?

A I was manager of the radio station. . .

Q Were you apprised of the terms under which the 92 percent stock would be sold? Before your takeover?

A I was advised of what my share would be, yes, sir, to that degree.

Q Were you advised about the sales terms, or the sales price?

A I don't quite -- you mean the total?

Q The total price.

A No, I didn't know the total price, no, sir.

Q What was your understanding as to your obligation as a
857 member of this group of six?

A My understanding was that I would own 53 shares of stock, for a cost of \$6,600 or so, and 66 cents, or so, something to that order. And that through payments that the corporation would make, then my stock should be worth in five years somewhere in the neighborhood of \$12,000, \$14,000. That was my understanding.

Q Did you understand whether you were personally obligated to make any further payments in addition to the 6,600 and the odd amount of dollars?

A That was the total amount, plus there would be

interest on half of that amount. You see, half of that was in cash, and half of it was on terms, and there was interest on it.

Q Did you understand whether you would have any personal obligation to pay any additional sums in addition, in excess of the \$6,600?

A No, sir.

Q Do you understand --

MR. BOOTH: Can we make sure there isn't a double negative there?

PRESIDING EXAMINER: When you say no, which connotation do you intend, sir, that you didn't understand, or that --

THE WITNESS: No, that I was not obligated for anything other than the \$6,000.

872 Q Now do you know a B. E. Bryant?

A Yes.

Q Did you -- when did you first get to know Mr. Bryant?

A While I was still living in Asheville, probably in 1956 or '57.

873 Q How often did you see Mr. Bryant?

A There was no certain pattern. Maybe once a week, maybe twice a week, maybe every two weeks.

Q Where did you see him?

A Oh, in the general vicinity of Biltmore.

Q Were those casual meetings, or were they prearranged

meetings?

A Very casual.

Q Now, did you in 1960 visit Mr. Bryant in his home?

A Yes, sir.

Q Do you recall the date?

A I remember one date. I believe.

Q Did you visit him several times?

A I have been to his house several times.

Q Now what were the purposes -- what was the purpose of

these trips?

A The first two trips, I made at his request, at the time he was filing his application. The second trip, I came with him because I had been involved. On the third and fourth trip, because I had been involved.

Q Who paid for these trips?

A Mr. Bryant paid for the first two, and as well as I remember, we kind of shared expenses on the others.

Q Did anyone else accompany you and Mr. Bryant on any of these trips?

A Mr. Slatkin, on the May trip, 1961.

Q All right.

Now on the first trip, in 1960, what was the purpose of your coming to Washington?

A I came with Mr. Bryant.

Q Did you have any other reason?

A No, sir.

Q What did Mr. Bryant come up here for?

A He came to see his engineer.

Q Who is his engineer?

A Mr. SharpC.

Q Is that Mr. Nugent ^{Sharpe?} ~~Sharp?~~

A I believe that's right.

Q Did you accompany Mr. Bryant to Mr. ^{Sharpe's} ~~Sharp's~~ office?

A Yes.

Q Did you stay in Mr. ^{Sharpe's} ~~Sharp's~~ office while the discussions were going on?

A I was in quite a bit.

Q Did you overhear the conversation between Mr. Bryant and Mr. ^{Sharpe?} ~~Sharp?~~

876 A I am sure I heard some of it. They were all together.

Q So you know what the conversation was about?

A I remember hearing some of it.

Q Was the subject matter the engineering portion of Mr. Bryant's application for a new station on 920 kilocycles in Asheville, North Carolina?

A Yes.

Q Do you know what Mr. Bryant paid Mr. Nugent ^{Sharpe} ~~Sharp~~ for his engineering services?

A No, I don't.

* * *

Q Did you know what the initial retainer was that Mr. Bryant had to pay Mr. ^{Sharpe} Sharp?

A Mr. Bryant told me. I didn't hear the conversation. Mr. Bryant told me later. I heard it here this week, I think, or last week.

Q What did Mr. Bryant tell you last week that the initial retainer was?

A I think it was \$500.

* * *

880 Q I understand that you were in Mr. ^{Sharpe's} Sharp's office during this first visit in 1960, and you overheard most of the conversation?

A I was in and out of his office. I wasn't there all the time.

Q But it was your understanding that that is the reason Mr. Nugent ^{Sharpe} Sharp sent Mr. Bryant and asked Mr. Bryant to return with some additional information.

A It is my understanding.

* * *

Q Now, sir, on the second visit in 1960, did you accompany Mr. Bryant to Mr. Sam Miller's office and to Mr. Nugent ^{Sharpe's} Sharp's office?

A Yes.

* * *

882 Q Did Mr. Bryant have a discussion with Mr. Sam Miller on this second trip in 1960?

A Yes, I am sure he did.

Q How are you so sure? Were you present?

A Well, no. Not all the time. I went in and met Mr. Miller, and I think there was another fellow there by the name of Fields, and I hung around maybe five, ten minutes, and I left.

* * *

884 Q Now, who paid for this second trip to Washington, D. C., in 1960?

A Mr. Bryant.

* * *

Q Did you pay for any of Mr. Bryant's expenses on this first and second trip to Washington, D. C., in 1960?

A Not that I recall. I might have bought a meal, or bought a beer, or something.

Q Now turn your attention to the visit in 1961. Do you recall the date of the first visit to Washington, D. C., that you took with Mr. Bryant?

885 A I think it was May. Sometime in May, 1961.

* * *

Q Now what was the purpose of your visit in May of 1961? You already testified before that you were personally involved. I would like to know exactly how you were involved, and what your reasons were for coming here.

A When Mr. Pressley entered his motion to enlarge issues, I think that's what it was, he brought me into it. Mr. Pressley brought me into it.

Q And how did that relate to your trip to Washington, D. C., in 1961, in May?

A I thought it would be to my advantage to see what the

situation was.

Q Now where did you hope to check the situation in Washington, D. C.?

A I have an attorney.

Q In other words, the purpose of your visit was to see your attorney. Is that correct, sir?

A Yes.

* * *

Q And who paid for that trip to Washington, D. C.?

A Well, I think Mr. Bryant and I shared the money out of the pocket, or at least, we attempted to. I don't think we sat down and counted up. There was about \$25, and \$12.50 here and \$12.50 there, but we reasonably shared it, and I furnished the airline tickets.

Q You furnished the airline tickets for all three?

A Right.

Q And then you and Mr. Bryant shared Mr. Slatkin's expenses.

A I believe that's right.

Q How did you pay for the airline tickets?

A Through a trade-out agreement.

Q Was that Piedmont Airlines?

A Yes, sir.

Q Whose trade-out agreement was it with Piedmont Airlines that paid for this trip?

A WALT's.

* * *

890 MR. FISHER: This is the September, on the fall trip, in
1961. The fourth trip to Washington, D. C., with Mr. Bryant.

BY MR. FISHER:

Q Who paid for the travel expenses?

A I think we shared those, to pay our own way.

891 Q You paid your own way.

A We paid our own way, is what I remember.

* * *

906 Q Now at the time the negotiations were conducted for the
purchase of shares in WWIT in 1958, was it your understanding
that you could have gotten those shares without eventually entering
into a consulting contract with Mr. Middleton or Mr. Edney?

A It was my understanding -- can I answer my understand-
ing instead of answering the question?

My understanding that additional monies would be paid by
the corporation. I didn't know on what basis.

Q Did you then understand that unless the corporation
undertakes to pay these additional monies, you could not have
purchased those shares?

A I assume that I might understand it that way. I knew
907 that there was additional monies to be paid.

Q Did you know that without this additional money, you
could not have gotten your shares?

A I don't know whether I really thought about it in that
light or not, but I imagine that would be true.

* * *

12 Q Mr. Paxton, did you in your capacity as general manager of station WWIT ever pay Mr. Palmer Greer for obtaining a copy of Mr. Vernon Pressley's application for a new station in Canton, North Carolina?

A Yes, sir.

Q Did he in fact obtain a copy of that application for you in your capacity as general manager of WWIT?

A Yes, sir.

Q Did Mr. Palmer Greer perform any engineering studies in connection with Mr. Pressley's application?

A Yes, he diagrammed an interference chart for him.

* * *

18 Q Well, sir, yesterday you testified that you were not involved in the negotiations leading up to the purchase of the WWIT stock by the group of six people, including yourself, in 1958. I would like to ask you some clarifying questions just to narrow it down exactly. Did you have any role at all in the negotiations?

MR. BOOTH: Mr. Examiner, I objected to the question on the use of the "role", yesterday, and as I recall, you sustained the objection, and I will be consistent.

PRESIDING EXAMINER: I will sustain it, Mr. Booth.

By Mr. Fisher:

Q Did you participate in the negotiations at all, sir?

* * *

19 THE WITNESS: Repeat that question.

By Mr. Fisher:

Q Did you participate at all in the negotiations?

A No, sir.

* * *

921

Q Mr. Paxton, do you know Mr. Roy Lucas?

A Yes.

Q Who is Mr. Roy Lucas?

A He is editor of the Canton Enterprise.

MR. BOOTH: I beg your pardon?

THE WITNESS: He is Editor of the Canton Enterprise Newspaper, Canton.

* * *

922

Q I am asking you whether you had any conversations concerning Mr. Pressley, his person, not his application.

A Yes, I believe we did. I think I recall it.

Q Do you recall any specific conversations?

A I remember Mr. Lucas asking me for an opinion on whether he should hire him or not.

Q When was that, sir?

A 1959.

Q What part of 1959; do you remember?

A November, late November, the first part of December.

Q And what was your response to Mr. Lucas?

A I didn't make a recommendation.

Q Did you say one way or another?

923 A No, I said do whatever you want to about it. I told him that Mr. Pressley had asked me for a job, and I turned him down.

* * *

928

Q Mr. Paxton, you have already testified that Mr. Greer did prepare an interference study of Mr. Pressley's application. Do you recall whether that study showed interference to Station WTCW in Whitesburg, Kentucky?

A Yes. It did.

Q It did. Do you know a Mr. Crosthwaite? And I will have to spell that C-r-o-s-t-h-w-a-i-t-e.

Do you know a gentleman by that name, sir?

A I have never met him.

Q Have you ever talked to a gentleman by that name at Station WTCW in 1959 or 1960?

A Yes, sir.

Q How many conversations did you have with this gentleman?

A One, if I remember.

Q Did he call you, or did you call him?

A I called him.

Q Did you in your conversation discuss Mr. Pressley's application?

929

A Yes, sir.

* * *

931

Q Mr. Paxton, before the luncheon recess, you were talking about your conversation with Mr. Crosthwaite in 1959, concerning Mr. Pressley's application.

Did you, in the course of that conversation, also discuss with him WTCW's possible interest in asking for a power

increase?

A No, sir.

Q Do you recall what frequency WTCM operates on?

A No, sir.

Q Did you offer your help to Mr. Crosthwaite or to Station WTCM, in any way?

A I told Mr. Crosthwaite that if he was considering a 307 (b) I believe it is the term that is used, that I would be glad to furnish any information I could from our area.

* * *

937 Q Mr. Paxton, was the possibility of an economic protest against Vernon Pressley's application discussed at WWIT or with WWIT stockholders in 1960?

938 A I think that would have been in 1959, that it was discussed.

Q Did you participate in such discussions in 1959?

A Let me say this was not a -- we did not have a meeting especially to discuss this item. It was just brought up in conversation.

Q I understand that there was no formal proceeding or meeting?

A Right.

Q But in it your testimony that it was kicked around?

A Yes.

Q And you participated in those discussions?

A Yes, sir.

Q Now what conclusions, if any, were reached concerning the possibility of an economic protest?

A It was our understanding that the FCC didn't listen to this type of protest any more, and it would be wasting time and effort to try to advance it.

Q Before you took the trips with Mr. Bryant in 1960, were you a close companion of Mr. Bryant?

A No, sir.

Q Did you have any business dealings with him before that first trip in 1960?

A No, sir.

Q Did you have subsequent business dealings with him?

39 A Yes, sir.

Q What were these dealings, sir?

A I bought into an oil lease, or drilling venture, or something of that degree.

Q Did you have any additional business dealings with Mr. Bryant?

A I don't recall.

Q Would you recall if you had any?

A I would think so.

* * *

Q Mr. Paxton, when I say "oil interest" in my following inquiry, I am referring to that one dealing, one business dealing that you had with Mr. Bryant.

40 When did you buy this oil interest?

A In April 1960.

Q Do you recall the exact date?

A I believe it was on the 27th.

Q How much did you pay for that?

A \$500.

* * *

946 Q Do you still have an existing interest in that oil lease, sir?

A The way I understand it is that after so many or so much time has elapsed, that the lease runs out.

Q Has this particular lease run out?

A I understand it has.

* * *

963 Q Did Mr. Slatkin, to your knowledge, help in the preparation of Mr. Bryant's application for a new station in Asheville, North Carolina?

A It is my understanding that he did.

Q When did you first become informed about the fact that Mr. Slatkin helped on Mr. Bryant's application?

964 A I knew that he was supposed to the day before he actually did. I think it was the day before.

Q Do you recall which date that was?

A Probably April 26th. That seems to set in my mind. I believe that would be about -- I believe that would be it. Probably the 26th.

Q To your knowledge, Mr. Slatkin was supposed to work on Mr. Bryant's application on April 26th. Is that correct?

A No. I believe it was the 27th, is when he was supposed to.

Q April 27th, he was supposed to work on it, and you found out about it on April 26th. Is that it?

A 25th or 26th. I am not sure.

Q A day or two ^{before} he actually worked on it, you found out that he would be working on it.

A Yes, sir.

Q Is that right?

A Yes, sir.

Q Was April 27th a working day for Mr. Slatkin at the station WWIT?

A Normally, ~~yes~~, sir.

Q Now, did the special arrangements have to be made for permitting Mr. Slatkin to leave his duty station at WWIT for April 27th, 1960?

A I arranged a trade-out; I think is the way it was, for it. I believe that was right.

Q You arranged a trade-out of time?

A I made it possible so he could arrange it, or something. I don't remember how that went.

Q In other words, you made the arrangements that made it possible for Mr. Slatkin to take off on April 27th, 1960. Is that correct?

A Yes. I think that's correct.

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Q Did you know at the time you made that arrangement why Mr. Slatkin wanted to have the day off on April 27, 1960?

A Yes, I knew.

Q How did you learn about it?

A Mr. Bryant, through Mr. Bryant.

Q Did Mr. Bryant tell you directly?

A He said he had been in touch with Mr. Slatkin. If he could get his schedule switched around, why, he would help him.

Q Did Mr. Bryant first approach you about this, or did you approach Mr. Bryant about this?

A I think Mr. Bryant approached Mr. Slatkin first, and then he cleared it with him, and then he asked me.

* * *

Q And did Mr. Bryant at the time tell you why he needed

966 Mr. Slatkin?

A He knew Mr. Slatkin's background.

* * *

CROSS-EXAMINATION

968

BY MR. REILLY:

* * *

969

Q Well, if Mr. Slatkin were to assist Mr. Bryant on April 27, as I think the record reflects that he did, this would necessitate Mr. Slatkin not being present at his normal shift at WWIT on April 27th, would it not?

A That's right, yes.

Q Right.

Now, had you been previously contacted by Mr. Bryant, in your capacity as station manager, or in any capacity?

A I think really it was -- to kind of get things in order, I think, it was discussed, maybe on the 25th or 26th, and I think I followed it up on the 26th, maybe with a phone call to Mr. Slatkin to tell him that the time could be changed around.

Does that answer your question?

Q Now it starts to answer my question. It does not answer it completely. You think that it was started on the 25th, maybe. What was started, precisely, to the best of your recollection?

A Well, Mr. Bryant had relayed to me that Mr. Slatkin could help him, if I would let him off. He had already been in touch with Mr. Slatkin, and I said, well, I don't know if I can let him off or not, but I will see if I can arrange it with one of the other announcers to help him with his schedule.

Q Now at or about that time, had you previously indicated to Mr. Bryant that Mr. Slatkin was a person who was knowledgeable in the filling out of applications and who might be made available?

A No, I think Mr. Bryant asked me about it, is the way I recall it.

* * *

Q Yes, well, what I am trying to get at is preliminary. If the only thing that you recall that was needed to finalize the application were those things suggested by Mr. Nugent Sharp, the consulting engineer, and you said that Mr. Slatkin was not a consulting engineer, or had no engineering background or

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knowledge, how did it come about that there was a conversation between you and Mr. Bryant which lead to your checking Mr. Slatkin's schedule to see if he could be made available?

A Oh, I think that he said he would like to have him, or needed him, or could use him, something to that effect.

Q Did you suggest to Mr. Bryant that he might need him or that he could utilize him?

A No, sir.

* * *

982 Q Did you initiate any conversations with Mr. Bryant concerning the possibility of Mr. Bryant's filing an application for a radio station?

A No, sir.

Q Who initiated any such conversations, if any were held?

A It is my understanding that Mr. Edwards did.

Q I mean conversations with you. Who made the first contact with you, concerning Mr. Bryant's plans?

983 A Mr. Bryant.

Q And do you recall how long it was prior to the time you came to Washington April 25th that you heard from Mr. Bryant?

A It was either ^{the} Friday or Saturday before.

Q So that would make it the 22nd or 23rd of April?

A Yes, sir. Somewhere.

Q And how did Mr. Bryant contact you? By telephone,

in person, by letter, or some other way?

A I think it was by phone..

Q And what did Mr. Bryant tell you, or what did he ask during that call?

A He said that he was going to apply for a station in Asheville, explained it to me, what he was going to do, and said, "If I need some help, would you help me?"

I said, "I would be glad to do what I can do for you."

Q Did you understand, or did he explain to you that he was asking you as a person he knew in the radio business, or was he asking because of some connection with the Pressley application?

A He was asking me because he knew about me, knew of me and about me.

Q During that discussion, was there any mention of the Pressley application, do you recall?

A I don't recall any.

Q Now, when you -- where did you obtain the ticket for passage on your first trip to Washington and return?

A They were ready at the ticket office at the airport when we arrived.

Q Did you pay for those, for the ticket that you used?

A No, sir.

Q Do you know who did?

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985

A Yes, sir.

Q Tell us what you know.

A Mr. Bryant paid for it.

Q And do you know how he paid for the tickets?

A Yes, sir.

Q How?

A American Express credit card.

Q Did you have an American Express credit card at that time?

A No, sir.

Q Have you ever had an American Express credit card?

A No, sir.

* * *

986

Q Now as I understand your testimony in response to questions by Mr. Fisher, you and Mr. Bryant visited the offices of Mr. Sharp the day after your arrival in Washington, which would be April 26th. Is that correct?

A That's correct.

Q Now, at the time, did Mr. Bryant, to your knowledge, strike that.

Now, at the time of your first meeting in Mr. ^{Sharpe's} ~~Sharp's~~ office with Mr. ^{Sharpe} ~~Sharp~~, do you know whether Mr. Bryant had information concerning a proposed transmitter site with him which he gave to Mr. ^{Sharpe} ~~Sharp~~?

A I feel reasonably sure that he had that with him.

Q And upon what do you base your reasonable assurance?

A It just seems that I remember that that's the way it was. I am pretty sure that he already had his site.

Q And did you participate in any way with Mr. Sharp or with anyone else in the selection of that transmitter site?

A No, sir.

Q Did you participate in negotiating any arrangements on behalf of Mr. Bryant?

Let me backtrack. May I have the last question read, please? I think I misspoke myself.

(The reporter read the pending question from her notes.)

By Mr. Booth:

Q And did you participate in any way with Mr. Bryant in the selection of that transmitter site?

A No, sir.

* * *

987 Q You have --do you know who the attorney was, who the Washington attorney was for the Western North Carolina Broadcasters, Inc., during the period immediately prior to your purchase of stock in the corporation?

A Do I know now, or did I know then?

Q Do you know now?

A Yes, sir.

Q And did you know at the time the transaction was consummated in the summer of 1958?

A No, sir, I didn't know then.

Q Was Eliot Lovett the attorney for the corporation in

Washington in 1958 and in 1959?

A Yes, sir.

Q And for how long did he continue as Washington counsel, communications counsel for the corporation?

A Until he passed away.

Q Now, sir, with respect to Mr. Slatkin, and the work which he performed for or on behalf of Mr. Bryant on April 27, 1960, was Mr. Slatkin performing that work under any instructions or directions from you or anyone else connected with UNIT?

A No, sir.

988 Q Did you supervise the work that he did in any way?

A No, sir.

Q Did you see the product of his work at any time prior to the time he completed it?

A Prior to his completion?

Q YES.

A No, sir.

Q Did Mr. Slatkin arrange to trade time with another employee or other employees of UNIT so that he could be free on that day? April 27th?

A That was my understanding. He had the authority or privilege or whatever it is. It was okayed.

Q At that time, was the trading of time among employees a frequent or an infrequent occurrence, or was it prohibited?

A It was very frequent. Done very often, and still is.

Q And was it necessary for employees desiring to trade time with each other to obtain your permission first?

A Not necessarily permission, but most of the time, I liked to know about it.

989 Q And you liked to know about it in advance?

A Yes, sir.

Q So when you testified that you arranged for Mr. Slatkin's schedule, did you -- what did you mean by that testimony? Or that you arranged for Mr. Slatkin to have the time off?

A I told him it was all right with me if he traded some time.

* * *

NUGENT SHARPE

993 was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Would you state your name and address for the record, please?

A Yes. Nugent S. Sharpe, 1601 Colonial Terrace, Arlington, Virginia.

Q What is your occupation, sir?

A I am a consulting radio engineer.

Q Were you a consulting radio engineer in 1960?

A Yes, I was.

Q Where were your offices at that time?

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A In the Warner Building, at 13th and E, Washington, D.C.

984

Q Did you have any contact with --- do you know

Mr. Dalton Paxton?

A Yes, I am acquainted with Mr. Paxton.

Q Did you have any contact with Mr. Paxton in May of 1960?

A No, not in May of 1960. In April of 1960.

Q I am sorry. In April of 1960.

When was your first contact with Mr. Paxton?

A Mr. Paxton called me on the telephone on Monday the 25th of April, to introduce his acquaintance, Mr. Billy Bryant, by telephone.

Q What was your conversation with Mr. Paxton at that time?

A During the telephone conversation, my initial conversation was with Mr. Paxton, on the subject of filing an application for Asheville, North Carolina, on the frequency of 920 kilocycles, and his question to me was whether this would be an application, if an application for Asheville were filed on 920 kilocycles, whether it would have a chance of winning, and whether it could be made competitive in the conditions that prevailed then.

Q Right.

How did Mr. Paxton identify himself on the telephone? Before that ---

A I am sorry, I don't recollect what identification was

given me.

Q Did he tell you whether he was the manager of a station?

A He did tell me that at some time, but I am not certain whether it was on Monday or on the following day, when he and Mr. Bryant came to Washington.

Q I see.

PRESIDING EXAMINER: Had you known Mr. Paxton before this, sir?

THE WITNESS: No, I had never met him before that time.

BY MR. FISHER:

Q Now what was your response to Mr. Paxton's inquiry concerning 920 kilocycles in Asheville?

A I asked him to wait on the telephone while I consulted rather elaborate records which I at that time kept to consider the likelihood that I could prepare an application that would make sense on the frequency of 920 kilocycles for Asheville.

Q Did Mr. Paxton indicate to you by what time he would like to have that study made?

A I don't think he gave me a specific date. However, from study of the material I had in my office, it was apparent that -- within 30 seconds, it was apparent that it would have to be filed in the course of the week we were then in.

Q Why did it have to be filed within the course of the

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926 week, sir?

A The Commission's procedures for processing applications at that time involved a cutoff arrangement, and the dates were published approximately 30 days before the cutoff date. In order to be considered with a particular group, one had to file by the date of cutoff, and that date that was current at that time, and which was very prominent in my consciousness then, was the 29th of April.

There was a group of approximately 50 applications which would become available for processing on the 29th of April, and among them were applications for these facilities or similar facilities in Canton, and in Kentucky.

Q What was the extent of your conversation with Mr. Paxton at the time before you started talking to Mr. Bryant?

A Well, I can remember saying this at the end of my study, which ^{was} ~~is~~ three or four minutes that I was not talking with Mr. Paxton, but was instead studying the records in my office.

I said that it would not be a stupid idea to file an application at Asheville, ^{if we could} ~~could we~~ prepare it by the 29th of April, and I believe at that point is when Mr. Bryant was then on the line, and from that point forward, I spoke on the telephone only to Mr. Bryant on that Monday.

MR. BOOTH: Mr. Examiner, I hate to interrupt, but because it may save time on cross-examination, can I have the response

227 to the preceding question read?

PRESIDING EXAMINER: Surely, Mr. Booth.

(The record was read by the Reporter.)

BY MR. FISHER:

Q Sir, you have already testified that it takes you about 30 seconds to determine the situation from your files, and you also testified that there was a three- or four-minute lag in your conversation with Mr. Paxton.

Would you please explain the difference in timing? What did you do for the rest of the period?

A Well, yes.

Owing to the arrangements the Commission then had for processing, it was a very exciting sort of intellectual chess game that was laid before the engineers. We have a number of engineering rules pertinent to allocation of facilities. I kept, as I say, rather elaborate records concerning both existing facilities in a map book and extensive records concerning pending applications before the Commission.

Now in the 30 seconds, one could see that the idea was an interesting one, and one worth pursuing, to the extent of seeking in the book of patterns laid out on maps of the United States, one map of the United States for each succeeding frequency, examining these successive maps for the frequencies concerned between -- that would be 890, 900, 910, 920 kilocycles, 930, 940, and 950 -- to see the other operations in

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998 the immediate vicinity of Asheville, and to do a similar thing for the applications that were currently on file with the Commission, on these same seven frequencies.

The three or four minutes was consumed in thumbing through these materials, and estimating, that is, doing calculations in the head, rather than precise calculations on paper, as to the possibilities of designing an antenna that would fit the circumstances and permit an application to be made which would be in accordance with the rules and technically workable.

Q Do I correctly understand -- and please correct me if I am wrong; I am just trying to clear it up in my mind, and narrow it down to something that I can work with -- are you saying in effect that within 30 seconds you could determine what the situation was on that frequency in the area, and the additional time was taken up in checking out the adjacent frequencies?

A It is hard to draw the distinction quite that finely. The 30 seconds indicated that it was worth looking at. The three or four minutes gave me additional details which permitted me to tell Mr. Paxton that I thought it was not at all a stupid idea to think seriously of going ahead with this, in view of the short time that was available for preparing the application.

Q Was there anything else said during this conversation with Mr. Paxton and Mr. Bryant?

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MR. BOOTH: Well, can we break it down to Mr. Parton and then to Mr. Bryant, rather than both together?

MR. FISHER: Glad to.

THE WITNESS: I did talk with Mr. Bryant. However, I find it very difficult to remember exactly what I said to him, or even approximately, although I know what my -- I know what I believe my attitude would have been, having done this study, and having a prospective client on the other end of the telephone line.

PRESIDING EXAMINER: Please, Mr. Sharpe, don't tell us anything but what you remember, sir.

THE WITNESS: Oh, all right.

I do not remember specifically what I said.

BY MR. FISHER:

Q Did you at the time discuss fees?

A Yes, I did, on the telephone, I discussed fees.

Q What was your fee quotation, sir?

A I told Mr. Bryant that I would require a retainer of \$500, and I estimated that the cost of preparing the engineering portion of the application would be in the vicinity of \$1500.

I think -- I am sure that I also told him that I would require the retainer to be brought to me during the week, and arrangements were made, and my understanding at the end of the conversation was that Mr. Bryant would arrive the following day, bringing some information and the money I had requested.

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Q Did you ask Mr. Bryant to come to Washington to see you, or did he offer to come on his own?

A I can't be certain.

Q Did you see either Mr. Bryant or Mr. Paxton in Washington, D. C., during that week?

A Yes, On Tuesday morning, Mr. Paxton and Mr. Bryant came to my office.

Q Excuse me.

You said that the first contact was on April 25th. Is that correct?

A That is correct.

Q Do you recall what day of the week that was?

A Yes, that is Monday.

Q That is Monday. And the Tuesday following that ---

A Was the day that Mr. Bryant and Mr. Paxton arrived in Washington, bringing with them some information that was needed for the preparation of the application.

The information they brought was a legal description of the property, and a photostatic negative of the application of Mr. Pressley at Canton.

* * *

1601

Q Were both Mr. Paxton and Mr. Bryant there throughout the discussion?

A I don't remember being alone with Bryant for any extended period of time, although I do not believe that Mr. Paxton was with us at every moment, throughout the time.

they were first in my office on the morning of the 26th April.

* * *

Q Did you make any inquiries as to why Mr. Paxton was present --

MR. BOOTH: Object.

MR. FISHER: -- during these discussions.

PRESIDING EXAMINER: On what grounds, sir?

MR. BOOTH: Irrelevant, immaterial.

MR. REILLY: Quite the contrary. I think it most relevant and most material.

PRESIDING EXAMINER: Objection is overruled.

BY MR. FISHER:

Q Would you answer the question, please?

A Yes, I made inquiries as to whether there were financial transactions between Mr. Paxton and Mr. Bryant, whether they had joint bank accounts, whether they -- whether Mr. Paxton would profit from -- financially profit from the operation of Mr. Bryant's proposed station, and I was told that there were no transactions between them, and that the station would be entirely the property of Mr. Bryant.

Q Now, sir, at the time you made these inquiries --

PRESIDING EXAMINER: Just a minute, Mr. Fisher.

MR. BOOTH: He hasn't finished his answer.

PRESIDING EXAMINER: Who told you this, sir?

THE WITNESS: Mr. Paxton and Mr. Bryant.

PRESIDING EXAMINER: They each said this, or just one of them?

THE WITNESS: Well, I think my questioning went along like "Do you fellows have joint bank accounts?" And both sort of shook their heads.

"Will Mr. Paxton own any portion of this proposed station?" And they both shook their heads. I think that was specifically -- I am sure that is specifically how I asked the questions, and I believe their answers.

PRESIDING EXAMINER: Thank you, Mr. Sharpe.

Excuse me, Mr. Fisher. Go ahead, sir.

BY MR. FISHER:

Q At the time you made these inquiries, did you understand what Mr. Paxton's occupation was?

A Yes, at some time, he had told me that he was manager of a station in Canton, Ohio -- Canton, North Carolina.

1005 Q Did you see either Mr. Bryant or Mr. Paxton again that week?

1006 A I saw Mr. Bryant on Friday, during the time that we assembled the portions of the application that were to be filed later that afternoon.

Q Did you also see Mr. Paxton at that time?

A No, I did not.

Q Do you know whether Mr. Paxton was in Washington, D. C., on Friday, April 29th?

A I had no indication that he was in Washington.

Q Did Mr. Bryant pay your retainer fee on Monday,
April the 25th?

A On Tuesday, the 26th.

Q Tuesday, the 26th.

Did he pay you in your office?

A I have an image of his writing the check in my office,
yes.

Q In other words, he paid you by check. Do you recall
whether it was a personal check?

A It was a personal check, and I -- the same Tuesday --
took it to the bank, approximately the noon hour, and deposited
it then.

Q Was Mr. Bryant with you at the time you deposited it?

A Yes, He did go with me to the bank, as did Mr. Paxton.

Q Did Mr. Bryant have any comments on your depositing
the check?

A I recollect that he did express surprise that I was
depositing the check immediately, and he made some indication
that it would be in Asheville very soon. I can't quote the
words he used at the time.

Q Now in any of your discussions with Mr. Bryant con-
cerning his application, was the possibility of applying for
another frequency ever discussed?

A No, it was not.

1019 CROSS-EXAMINATION--By Mr. Booth

Q Now, sir, you have told us of a telephone call received on April 25th, during which the callers were identified as Mr. Paxton and Mr. Bryant.

Was that the only telephone conversation you had with either Mr. Bryant or Mr. Paxton that day?

A That day? I believe I had no other conversations that day. I don't recollect another one.

Q And do you recall the time of day that conversation was held?

A Yes, I recall that it was in the morning of Monday.

Q And as I understand that telephone conversation, you devoted some maybe 30 seconds time off during which there was no talking to look at your allocation maps, and another three or four minutes to look at the pending applications.

Is that correct?

A Well, the distribution of time is not exact. I spent some few minutes while Mr. Paxton waited at the other end of the telephone line, while I did consult material concerning the assignment of broadcast channels in the vicinity of Asheville to distribute the time with the precision that 30 seconds or three or four minutes implies would be very difficult for me to do at this time.

1020 Q Then after that period of three or four minutes, is it my understanding that you then told Mr. Paxton that it didn't look like such a silly idea to file an application?

A That is correct.

Q Or words to that effect?

A Words to that effect, yes.

Q And then you talked to Mr. Bryant by telephone, Mr. Bryant came on the line, and you discussed with him the question of fees?

A That is correct.

Q And would you say that the overall conversation probably lasted not more than ten minutes?

A Not more than ten minutes. That is correct.

* * *

021 Q Mr. Fisher asked if another frequency, the possibility
022 of using another frequency, was ever discussed. Did you suggest another frequency might be available or the availability of another frequency might be explored other than 920 kilocycles?

A I did not make that suggestion.

Q Was there a particular reason why you believed that an application for 920 kilocycles in Asheville was feasible?

A Well, it was feasible because here was a man who was prepared to apply for it, and the engineering and technical difficulties in it appeared to be quite surmountable.

Q Was there a reason why you did not, any other reason why you did not suggest the possibility of a frequency search to see if another frequency was available?

A Yes, because the application could be processed very

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promptly if filed by the 29th of April, 1960.

Q If I remember your testimony correctly, in December of 1961, you testified that it was the practice, your practice and the practice of some engineers -- and correct me if I am wrong -- to attempt to file applications on or close to cutoff dates, because it would save some 14 months of time while awaiting processing at the Commission.

Do you recall testimony to that effect?

A Yes, I do. I recall the strategies that were involved in that particular period of time.

1023 And I know that many applications were filed on each of these cutoff dates, in competition or in conflict with other applications on the processing lists. More study of the Commission's records in this connection would indicate the number of applications filed on the dates specified by the cutoff lists, and a comparison of the applications with those already on the lists, a comparison of the nullified ones with those on the list would indicate that most of the nullified ones were either in mutually exclusive relationship to the ones on the list, or in interference, electrical interference with the ones on the lists.

Q And did you so explain to Mr. Bryant that time would be saved by filing an application for 920 kilocycles at Asheville?

A I don't think I explained that, because it was my

view that this was recognized by Mr. Bryant. Mr. Bryant, I believe, had the impression that he would have a distinct advantage by making at that time an application for a new broadcast facility in Asheville.

He felt that he would become the owner of a station in Asheville. It was not necessary to explain to him the details to encourage his further interest in filing, because he was quite interested when he first came to me.

Had the man not been interested or had he been more timorous, I might have explained the advantages of the immediate filing to him in greater detail.

024

Q Now, sir, you testified in response to questions by Mr. Fisher that you did ask a number of questions concerning other than engineering matters, based upon, and the questions were based upon your experience while an employee of the Commission, and knowledge of the Commission's general requirements of the processing procedures.

A Yes.

Q Did you also consider and discuss with Mr. Bryant the Section 307(b) aspects involved in the applications for Asheville and Canton?

A I didn't discuss the 307(b) question with either Mr. Paxton or with Mr. Bryant.

Q Now, sir, did you consider the 307(b) aspects in attempting to prepare a proposal which would have higher power

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and greater coverage of population than that of the Canton application?

A Well, I considered it to the extent that you have indicated, but not to the extent of trying to figure out priorities of where a new service would be assigned by the Commission's policies. It appeared to me to be more desirable to assign a new facility to Asheville than to Canton at that time, and a detailed consideration of the 307(b) question did not even come forth in my own mind.

I can't say that I considered it in detail in my own mind. Just by instinct. It appeared to me that Asheville was the superior place to put the station.

1025

Q Now, Mr. Sharpe, how did you know the person on the telephone -- how did you know that it was Mr. Paxton you were talking to during this telephone call on April 25th?

A Well, the person at the other end of the line told me it was Mr. Paxton.

Q So you based your testimony upon what was said to you?

A Exactly.

* * *

1035

Q Would you please tell us how much money was paid to you by Mr. Bryant during the week of April 25th, 1960?

A Mr. Bryant during the week of April 25, 1960, gave me two checks, one on the 26th of April for \$500, and one on the 29th of April for \$300.

Q And before the application was dismissed in September or October of 1961, had not Mr. Bryant paid you a total of approximately \$1700?

A Approximately \$1700, yes.

Q And were any of the payments you received from Mr. Paxton ---

A No, none were.

Q Were any of the payments you received from Western North Carolina Broadcasters, Inc.?

A No; each of the checks I received had the signature of B. E. Bryant, without any indication of a corporation. They were personal checks of B. E. Bryant.

* * *

Q During your telephone conversation, first with Mr. Paxton and then that same day with Mr. Bryant, and then the April 26th visit in your office, of Mr. Bryant and Mr. Paxton, did either one of them say anything to you that indicated to you that the Bryant application was not being prepared or filed in good faith?

That is, with a desire to prosecute the application, gain a grant, and build a station?

A No, it was I who brought up the idea that it might not be in good faith, and I asked questions that I thought were designed to reveal to me whether it was in good faith, and I concluded from the answers to the questions that Mr. Bryant quite sincerely believed that he would one day own the actual

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radio station.

* * *

1042

DALTON PAXTON

was recalled as a witness and, having been previously sworn, was examined and testified further as follows:

* * *

1043

CROSS-EXAMINATION (resumed)

BY MR. BOOTH:

* * *

1044

Q Shortly before the close of the hearing yesterday, I asked you a series of questions concerning your first trip to Washington in April of 1960 with Mr. Bryant. With respect to the second trip in April of 1960, on what date did you travel to Washington?

A The second trip?

Q The second trip in April of 1960.

A We came up on the 26th.

Q The second trip?

A The 26th. Came up on the 26th, returned on the 29th.

Q Who paid for the airline tickets for that trip?

A Mr. Bryant.

Q And did he pay for them by American Express, if you know?

A Yes, sir.

Q And did you have an American Express card at that time?

A No, sir.

* * *

1047 Q Mr. Paxton, I would like to direct your attention to
page 874, lines 22 to 25 of your testimony of yesterday. Is
there a correction which should be made in that answer, either
1048 through a typographical error, a transcribing error, or perhaps
in a misstatement on your part?

MR. FISHER: Mr. Examiner, I object.

Let me just review it for just a second.

MR. BOOTH: On its face, it is obviously mixed up.

MR. FISHER: Oh, certainly. I am sorry.

MR. REILLY: Yes.

I know what you are leading to.

THE WITNESS: On line 23, the words "second" should be
changed to "third". I believe that will take care of that.

MR. BOOTH: Thank you.

I assume that will be made also in our motion to correct
the record, Mr. Examiner.

PRESIDING EXAMINER: I think it would be wise to do so.

* * *

Do you know where you went after leaving Mr. Miller's
office on that day, which was April 29th, 1960?

A I went to Mr. Lovett's office, Mr. Elliott Lovett.

1049 Q And was that the first time that you had met Elliott
Lovett in person?

A Yes, sir.

Q And do you recall how long you spent with Mr. Lovett
that day?

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A Oh, it is a little vague, but I would say an hour or two.

Q Now, sir, I direct your attention to your testimony yesterday on page 885, lines 17 through 19.

The question was as follows: "Now where did you hope to check the situation in Washington, D. C.?"

And the answer was, "I have an attorney."

To whom were you referring?

A Mr. Lovett.

Q And was Mr. Lovett your personal attorney, or was he the attorney for Western North Carolina Broadcasters, Inc., your employer?

A Western North Carolina Broadcasters.

1051

Q My question, sir, is this: * * * When did Mr. Vernon Pressley ask you for a job?

A It was in late November or early December, 1959. In my office.

Q Your office at WHIT?

A Yes, sir.

Q And was that request by Vernon Pressley prior to the telephone call from Mr. Lucas?

A Yes.

Q And was that request by Mr. Pressley, Vernon Pressley, prior to his employment with the Canton Enterprise in December of 1959?

A Yes.

* * *

1061

Q Yesterday, Mr. Paxton, I asked you if you could approximate the time when you and Mr. Slatkin first discussed the possibility of his preparing some or doing some additional work on an all-music or a Tempo format for WHIT.

1062

Your testimony was to the effect that it was in April of 1960. Can you be more specific as to when in April, 1960, you authorized Mr. Slatkin to prepare that material?

A Well, the exact date, I am not quite sure, but I know that this was a continuing discussion over a period of a good while, and probably continued all month.

We had several conversations relating to it, and the reasons -- not only relating to it, but also the reasons why we should have it.

Q What were the reasons which you believed that this work was desirable?

A Well, I had seen quite a few one-station markets have considerable problems when a second station came in, and I knew first-hand of the problems that came about in Forrester City and Shelby. I was very familiar with these two towns, and I didn't want to get into the same predicament that these stations got into, with old-fashioned black programming, and I wanted a little more modern sound, and I thought that this would be ^{the} ~~the~~ way to keep our listeners, and not lose, and it has proven to be true.

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We still do quite well, listener-wise, in our market.

Q Keep your listeners, I don't quite understand from your testimony. Would you clarify that?

Were you anticipating the grant of the Pressley application?

A Oh, yes, yes, sir.

1063 And we felt that with the type programming we had, it was very similar to the stations that I knew that had gotten warped pretty good with a second station, and I didn't feel we could afford that.

Q Are those two cities you have named both in North Carolina?

A Yes, sir.

Q When did you agree or offer to pay Mr. Slatkin \$50 for this particular work to be done with respect to the all-music format?

A I am not sure exactly.

Q By "you", I mean the corporation.

A I am not sure exactly how that came about, except Mr. Slatkin was just filling in, and he was working at a very low salary. Just in a conversation, he -- it was agreed that I should do that, that I should pay him extra for it, because I think I was paying him about \$60 a week, something like that.

Q I see.

The corporation was paying him about \$60 a week salary?

A Yes, just a temporary fill-in job that he had.

Q And why was it a temporary fill-in job for Mr. Slatkin?

A He was waiting for his grants.

Q At Black Mountain?

A At Black Mountain, yes, sir.

Q And you knew that at the time?

A I knew that when I hired him, yes, sir.

1064

Q Was the Tempo or all-music format developed by Mr. Slatkin ever put into effect at WMTB?

A Yes, sir.

Q And when?

A I think it was September 1st, 1960.

Q And is that general format still being followed?

A Generally. We have changed it quite a bit, but generally, it is the same.

* * *

REDIRECT EXAMINATION

1071

BY MR. FISHER:

* * *

1076

Q I direct your attention to the testimony concerning the Tempo format. Did anyone else work on the Tempo format?

A Everybody worked on it at one time or another.

Q Who conceived the Tempo format, as far as you know?

A Mr. Slatkin.

Q Did anyone else -- did anyone but Mr. Slatkin get paid extra for work on the Tempo format?

A No, sir.

* * *

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1080

RECROSS-EXAMINATION

BY MR. BOOTH:

Q Did anyone on the staff at WWIT other than Mr. Slatkin prepare any principal material in connection with the Tempo format?

A Not any written material.

Q Now to the best of your knowledge and recollection at this moment, were there any other announcers on the staff of WWIT who had had prior experience on so-called Tempo or all-music formats prior to the time Mr. Slatkin undertook this study?

A No, sir.

Q By your answer, "No", you don't know?

A None of us there at the station had any experience along this line.

Q Other than Mr. Slatkin?

A Yes, sir.

* * *
CURTIS T. STANLEY

1101

was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOOTH:

Q Will you please give your name, sir?

A Curtis T. Stanley, Route 1, Canton, North Carolina.

Q For how long have you lived in or near Canton, North

Carolina?

A Approximately, well, since the first days of '45.

Q Where are you employed, sir?

A I am employed at the Canton Electric Appliance Company.

Q Who is the owner of that company?

A Mr. Sid Watts.

Q Is that the Mr. Watts who has an interest in WWIT, if you know?

A Yes, sir, it is.

Q For how long have you been employed by Mr. Watts or his company?

A About 12 years.

Q Do you know a gentleman by the name of Vernon Edgar Pressley?

A Yes, sir, I do.

1102 Q For approximately how long have you known Vernon Pressley?

A Approximately 15 years.

Q Do you know his brother Joseph Pressley?

A Yes, sir.

Q For how long have you known Joseph Pressley?

A I have known the family all about the same amount of time, about 15 years.

Q Mr. Stanley, were you working in Mr. Watts' store in Canton on the morning of April 29, 1960?

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A Yes, sir, I was. * * *

Q On that date, did you see either or both Vernon Pressley and Joseph Pressley?

A Yes, sir, I did.

Q And did you see one or both?

A I saw both?

Q Where did you see them, sir?

1103 A Well, Joe Pressley came in the store approximately a minute or two ahead of the father on the morning of the twenty-ninth about 10 a.m.

Q Then what did you observe?

A Well, they stopped in front of the store, talking to Mr. Watts.

Q Is this inside of the store?

A Yes, sir, it was inside the store. They talked -- well, they were whispering, they were talking generally, and I overheard one of them.

Q Excuse me. I just asked you where they were.

A Yes.

Q Where were you when they first entered the store and the conversation with Mr. Watts began?

A Well, me and Mr. Watts was standing together in the store when they first entered, towards the front of the store.

Q Then did you stay at or close to the front of the store during the conversation between the Pressleys and Mr.

Watts?

A For a minute or two I did. Then I went to the back to wait on a customer.

Q Sir, there has been received or marked for identification in this case as Pressley -- or as WWIT Exhibit 10 what purports to be an affidavit executed by you under date of December 9, 1961. Do you have the original of that document?

A Yes, sir, I do.

Q Do you have it in your possession?

A Yes, sir.

Q Did you execute such an affidavit?

A I certainly did.

Q And did you have assistance in preparing that affidavit and, if so, by whom?

A I was called into the office of the attorney Joe Sam Schenck in Canton. He asked me about this. I made this statement of my own free will and he copied it, his secretary did, Miss Linda Clark, and I signed it.

Q Are the statements in that affidavit true and correct to the best of your knowledge and belief?

A Yes, sir, they are.

MR. BOOTH: Mr. Examiner, I would like to offer in evidence the document marked as WWIT Exhibit 10 and to substitute for the record, or leave in the record, photocopies which have already been submitted.

PRESIDING EXAMINER: Mr. Fletcher.

MR. FLETCHER: No objection.

MR. REILLY: No objection.

PRESIDING EXAMINER: WWIT 10 is received.

(The document heretofore marked
for identification as WWIT
Exhibit 10 was received in
evidence.)

* * *

1105

BY MR. BOOTH:

Q Mr. Stanley, this affidavit is dated December 9, 1961, approximately a year and a half after April 29, 1960. Could you tell us, sir, how you are sufficiently certain that this particular meeting occurred on April 29, 1960 so that you are willing to prepare an affidavit to that effect?

A You mean when this was in the store?

Q Yes.

A Well, at the time, or before I walked off, I heard one of the Pressleys -- I won't say which one -- making a remark that this is the final date. I had no knowledge of what he was talking about until later. I asked Mr. Watts what he meant by "the final date," and he told me that this was the final date of processing of his application for a radio station.

MR. FLETCHER: I move to strike; hearsay, immaterial, and irrelevant.

PRESIDING EXAMINER: Well, he already answered, and I will.

see where it goes.

BY MR. BOOTH:

Q Then did you ascertain from Mr. Watts what that particular date, the final date, was as to a calendar day?

A Yes, sir, I did.

Q That is how you arrived at the date of April 29, 1960?

A I did.

MR. BOOTH: No further direct.

11.06

PRESIDING EXAMINER: Mr. Fletcher, I am going to overrule your objection. For the purpose it was obviously offered, I think the testimony is appropriate.

CROSS-EXAMINATION

BY MR. FLETCHER:

Q Mr. Stanley, you do know as a fact you went to work at Canton Electric Appliance Company at nine o'clock a.m. on April 29, 1960?

A Yes, sir.

THE REPORTER: Would you repeat that question, please? I am not sure I heard it correctly.

BY MR. FLETCHER:

Q Mr. Stanley, you do know as a fact you went to work at Canton Electric Appliance Company at nine o'clock a.m. on April 29, 1960?

MR. BOOTH: Mr. Examiner, when I first heard the question, I think I misunderstood it, and I would like to object. He did

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not say he was at work positively at nine a.m. He said, in effect, in the neighborhood of nine a.m., and I don't want the question to be based upon an assumption not in evidence.

PRESIDING EXAMINER: Overruled.

BY MR. FLETCHER:

Q You have been employed there, sir, for 12 years?

A Yes, sir.

Q Do you have any other vocation or avocation,

1107 Mr. Stanley?

A Beg pardon?

Q Do you have any other work you do besides working with Mr. Watts?

A Yes, I do, at present.

Q Is that Stanley --

A That is Stanley Funeral Home.

Q Did you have it in 1960, sir?

A Yes, sir.

Q Do you spend any time or efforts in the funeral home during the course of the week, at the present time?

A When I am called.

Q When you are called?

A Yes, sir.

Q Does it happen during the normal working hours at the Canton Electric Appliance Company?

A Sometimes it does, yes.

Q Was this also the case back in 1960?

A Most of the time in '60, my son had taken care of the ambulance work, but when you have a funeral, I am at the funeral home.

Q Do you own the funeral home, sir?

A Me and Mr. Watts together.

Q Does Dr. Owens own any part of the funeral home?

A No; just me and Mr. Watts.

Q Has Dr. Owens loaned you any money?

A No, sir, he has not.

Q Mr. Stanley, I believe you testified that you were in the front of the store on the morning of April 29, 1960 with Mr. Watts.

A We were near the front.

Q Near the front in the company of Mr. Watts?

A Yes, sir.

Q And, if you were, you were in this position when both Pressleys came in?

A Yes, sir, we were.

Q Did you stay in the company of Mr. Watts and the Pressleys when the Pressleys entered the store?

A For just a minute or so.

Q Did not Mr. Vernon Pressley, according to your testimony, arrive in the store after Joe Pressley?

A Mr. Vernon?

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Q Yes, sir.

A Yes, he came in a minute or so behind Joe. Joe came in first.

Q You were with two -- Mr. Watts and Mr. Joe Pressley?

A I was with three. I didn't leave until after Vernon came in. It was only about a minute's difference in the time they came in. One came in the door first and the other one followed as they entered.

1109 Q At what time, sir, did you hear Mr. Watts say something about this being a terminal date or cutoff date of April 29?

A Well, it was on the same day after they left.

Q After they left?

A After the Pressley's left the store, I asked him what did they mean about a final date.

Q Did you hear either Mr. Vernon Pressley or Mr. Joseph Pressley specify this was the final date to Mr. Watts?

A I heard one of the Pressleys. I wouldn't refer to which one. One of the Pressleys made that statement.

Q While you were in the company of Mr. Watts and the Pressleys in the front of the store?

A Yes, sir.

Q How long were you in the company of Mr. Watts near the front of the store when the Pressleys --

A A couple of minutes, I would say, a minute or so.

Q In that minute or so, Mr. Joe Pressley walked in, followed by Vernon Pressley, when a terminal date of April 29 was mentioned?

A Yes, sir.

Q Did this particular date strike you as being unusual -- Strike that; I am sorry.

After the Pressleys left, sir, did you approach Mr. Watts and ask him what was meant by the final date of April 29?

1110 A I did.

Q This particular date that was mentioned by one of the two Pressleys impressed you, is that right?

A Yes.

Q To the extent you wanted to find out why?

A That is right.

Q Do you own any part of the Canton Liquor Company?

A No, sir, I do not.

Q Who asked you to prepare this affidavit, Mr. Stanley?

A Mr. Joe Sam Schanck in his office, and I prepared it before him.

Q You prepared it before him?

A And his secretary. He and him and the secretary was alone when I prepared it.

Q Neither Mr. Watts or Mr. --

A No, sir, no one else.

Q Did he give his reasons as to why he wanted the affi-

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davit?

A No, sir.

Q Did you know it was going to be used in a hearing before the Federal Communications Commission?

A No, sir, I did not at the time.

Q Did Mr. Schenck call you while you were on duty at the Canton Electric Appliance Company? Was it during the day, he called?

1111

A Yes, sir.

Q You were at work?

A He called me by phone and I went over to his office. I had no knowledge what he wanted until I got over there.

Q Did Mr. Watts ask you to go up to see Mr. Schenck?

A No, sir, he did not.

Q Did Mr. Schenck indicate to you the importance of this April 29, 1960 date? In other words -- Well, strike that. When you went to Mr. Schenck's office, what did he ask of you?

A When I went in the office, he asked me to have a seat. We sat down and talked a little bit. He asked me about the particular instance of Mr. Pressley coming into the --

Q Of your own knowledge, do you know where he got the information about --

A I do not.

Q To your knowledge --

MR. BOOTH: Excuse me. I think the reporter is having difficulty because the witness starts his answer before the question is completed. If you would wait just a minute, Mr. Stanley, please.

BY MR. FLETCHER:

Q Did you advise Mr. Watts of this particular date, on this particular date you were leaving your place of employment to see Lawyer Schenck?

1112 A No, sir, I did not. When I leave the place, a minute or so during the day, or he does, we just dovetail one another. One steps out of the door and maybe will be gone 10 or 10 minutes and be back.

Q Sir, how long were you in Mr. Schenck's office in reference to this particular affidavit?

A I was not in his office, I would say, over 20 minutes.

Q Was there another employee taking your place at that time of your absence?

A No, sir, there were none.

Q Was Mr. Watts there?

A Yes, sir, he was there.

Q You did not advise Mr. Watts you were going to see an attorney in reference to an affidavit you were going to prepare?

A No, sir, I did not.

Q To your own knowledge, you did not know where Mr. Schenck got the information in preparation or leading up to

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preparation of your affidavit here in evidence?

1113

PRESIDING EXAMINER: * * *
Read it back.

(The pending question was read by the reporter.)

THE WITNESS: That is right, I do not. I had no knowledge of Mr. Schenck having any information about this until I went to his office and talked to him. I had no knowledge of what he wanted me over there for even until I went over.

BY MR. FLATCER:

Q As of December 9, 1961, when you went to Mr. Schenck's office, you had no knowledge prior to entering his office as to what he wanted?

A No, sir, I did not.

Q He called you up and said, "Drop over"?

A Yes.

Q This was on December 9, 1961?

A Right.

Q When you entered his office, sir, you had a little chat about sundry and various things, is this right?

A Yes, sir, we had.

Q He asked you then specifically about a certain date in 1960?

A Right.

Q About an incident at Sid Watts' store?

A Right.

Q And this was a year and one-half later?

1114

A Yes, sir.

Q On December 9, 1961, in talking to Mr. Schenck, you had a recollection of this entire episode you have set forth here in WNIT Exhibit 10, your affidavit?

A Yes, sir.

Q The exact time is 10 o'clock?

A I said near 10 o'clock.

Q Near 10 o'clock. The exact date is April 29, 1960?

A Yes.

Q What day is it?

A Twenty-ninth day of April.

Q What day of the week was it, do you recall?

A No, sir, I don't.

Q Did you recall at that time when you made the affidavit?

A The time of the affidavit?

Q Did you recall the day of the week the time you made the affidavit what April 29, 1960 was?

A No, sir, I didn't.

Q Do you know now what day of the week April 29, 1960 was?

A No, sir.

Q Do you always work on Friday at the Canton Electric Appliance Company?

A Beg pardon?

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Q Do you always work on Friday at Canton Electric Appliance Company?

A I work every day of the week unless I have a funeral, and then I go home to take care of the funeral.

Q Is it your testimony on December 9, 1961 you recall all that is set forth here that happened on April 29, 1960?

A Yes, sir.

Q On the basis of a call from a Lawyer Schenck?

A Yes, sir.

Q And a visit to Mr. Schenck on that particular day when he asked you the incidents that happened at Sid Watts' store on April 29, 1960, and you advised him of this set forth here?

A Yes, sir.

Q Of your own recollection?

A On my own.

MR. FLETCHER: I have no further questions.

PRESIDING EXAMINER: Mr. Reilly.

BY MR. REILLY:

Q I represent the Broadcast Bureau in this proceeding. Now pointing your mind again to December, 1961, had Mr. Watts at any time in the surrounding days asked you if you had any recollection of a visit by the Pressleys?

A No, sir, he did not. We didn't discuss anything that day.

1116

Q Other than -- other than April 29, 1960, you had not discussed it prior -- that is, with Mr. Watts -- at all prior to going to Lawyer Schenck's office?

A Not to my knowledge we hadn't. I don't recall.

Q Now, do I understand your testimony correctly that on this day in 1960, first Mr. Joe Pressley came in and you and Mr. Watts and he stood and chatted?

A Yes, sir.

Q All right, do you recall any of that conversation whatsoever?

A Nothing more than I heard one of the Pressleys say --

Q We are just talking -- Edgar Pressley has not come into the story at the moment?

A No. He came in and spoke and said, "How do, sir; good morning," and that was it. Vernon followed.

Q Now he came in. Now you have both the Pressleys and Mr. Watts?

A Right.

Q And you are still present?

A Yes.

Q Do you recall -- did you stay there the entire time the Pressleys were with Mr. Watts?

A No, sir, I did not. I stayed a minute or so and went back to wait on a customer.

Q How far away would you have been at that time?

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A Well, it is approximately the distance from here to the door.

Q Would it have been possible for you to overhear any conversation while back there with a customer?

A No, sir.

MR. BOOTH: Could we show on the record some estimate of the distance that we could agree on, Mr. Examiner?

PRESIDING EXAMINER: What would you suggest, Mr. Booth?

MR. BOOTH: Forty feet.

THE WITNESS: The building is 90 feet long, and they were up in the front when I left them. Back there I was approximately halfway or two-thirds, I was a little better than halfway back in the store when I left to tend to the customer.

PRESIDING EXAMINER: You were probably some 40 or 50 feet away, is that correct?

THE WITNESS: Something like that, yes.

BY MR. REILLY:

Q What you do recall overhearing took place during the period of time when you remained there with Mr. Watts and with both of the Pressleys, is that correct?

A Yes, sir.

Q That lasted for how long, sir?

A You mean the meeting --

Q The period of time while you were there with the Pressleys and Mr. Watts.

1118

A A couple of minutes maybe; they were not in there over five minutes altogether.

Q Who did most of the talking during that period of time?

A I believe Joe was the one that did most of the talking -- Joe.

Q Did Mr. Watts do much talking?

A Well, they were all three -- I couldn't tell really which one it was -- they were all three talking -- Joe, Vernon, and Watts.

Q Do you recall what they were talking about?

A No, sir.

Q The only thing you recall is that which you have related to us now -- "Today is the final day"?

A Yes, and hearing one comment that this is the final date; that is all I recall hearing.

Q Do you recall anything of the subject matter under discussion?

A No, sir.

Q Was it shortly after the Pressleys left the store you asked Mr. Watts the significance of that date?

A Well, it was a few minutes, I would say 15 or 20 minutes after I got through talking with my customer that I went back to talk. When I got through with this, then is when I asked him what they meant by "the final date."

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1119

Q He explained to you that was the last date on which -- before their application was processed?

A Yes.

Q And you knew they had applied for a radio station?

A Not until maybe the day before that I had heard they had, a day or two before; I won't say the dates.

Q From whom did you hear it?

A It was the general talk on the street there would be a new radio station in Canton.

Q Was this of any significance to you?

A No, sir.

Q When Mr. Watts gave you the answer, he didn't answer your question as to what was meant by "This is the final day," did that mean anything to you?

A No, sir, it did not.

Q And Mr. Watts never mentioned it to you again until after you met at Mr. Schenck's office?

A We never talked about it any more.

Q did you talk about it after you had been to the attorney's office?

A I don't recall us talking about it really.

MR. REILLY: I have nothing further.

PRESIDING EXAMINER: Mr. Booth.

MR. BOOTH: Nothing.

PRESIDING EXAMINER: Mr. Fletcher.

1120

MR. FLETCHER: I have a few more.

BY MR. FLETCHER:

Q To whom did you give the affidavit after you executed it?

A He completed this after I left the offices; the secretary had taken it down and then she typed it up and she brought it over and I signed it. She brought it over herself and give me that copy and they had the other; I don't know where it went.

Q Weren't you curious as to where it was going and what it was for?

A It didn't make no difference to me.

Q Were you curious about the final date that was referenced by one of the Presseleys to Mr. Watts in the store the morning of April 29, 1960?

A Well, after we talked and found out this was the "file" date, I was curious to know what was meant by it.

Q Yes, but you weren't curious as to what was going to be done with this affidavit that was referencing what actually happened in the store on the morning of April 29, 1960?

A Not until a few days later that he was told there might be a hearing -- Mr. Joe told me there might be a hearing.

Q Mr. Joe?

A Sam Schenck.

Q Sam Schenck. Do you know, of your own knowledge, as to

1121 whether Mr. Schenck represents Sid Watts?

A I am not sure.

Q Did you pay Mr. Schenck for the preparation of this affidavit?

A Did I pay him?

Q Yes.

A No, sir.

Q Was he paid of your own knowledge?

A Not to my knowledge.

MR. FLETCHER: Thank you. No further questions.

MR. BOOTH: Nothing.

PRESIDING EXAMINER: Mr. Reilly.

MR. REILLY: One question.

BY MR. REILLY:

Q I note in the last sentence of your affidavit you stated that on approximately 8:15 on November 30, 1961, you recall Mr. Joe Pressley coming in and making a small purchase.

A He did, sir.

Q Do you recall today what the purchase was?

A No, I do not. It was a small item, whatever it was.

Q Do you recall the dollar value of it?

A No, sir, I don't.

MR. REILLY: Nothing further.

MR. FLETCHER: Just to clarify the question, is that

8:15 A.M. or P.M.?

1122

THE WITNESS: It is in the morning.

MR. FLETCHER: A.M.

PRESIDING EXAMINER: Mr. Stanley, do I understand you have been working for Mr. Watts for quite some years?

THE WITNESS: About 12 years.

PRESIDING EXAMINER: Is he your partner in the funeral business?

THE WITNESS: Yes, sir.

PRESIDING EXAMINER: Is he a friend of yours?

THE WITNESS: Yes, sir.

PRESIDING EXAMINER: When you executed the affidavit for Mr. Schenck, you knew it involved Mr. Watts, didn't you, sir?

THE WITNESS: I did.

PRESIDING EXAMINER: Did you know whether it would help him or hurt him?

THE WITNESS: I did not.

PRESIDING EXAMINER: You are a friend of his. Didn't you think you ought to talk it over with him when you prepared it?

THE WITNESS: Well, I wouldn't make an affidavit that would hurt or help anybody falsely, let me put it that way.

PRESIDING EXAMINER: Well, now, as his friend, didn't you think you should discuss it with him after you made it?

THE WITNESS: I did not until after it was wrote up and brought over, and I let him read this, this copy.

PRESIDING EXAMINER: So he read it before you signed it?

1123

THE WITNESS: No, sir.

PRESIDING EXAMINER: Well now, when you came back from Lawyer Schenck's office, was he still in the store?

THE WITNESS: Yes, sir, he was in the store.

PRESIDING EXAMINER: Did you tell him about what you had been to see Lawyer Schenck about?

THE WITNESS: Not until after -- well, the girl came over and I signed it. We had a few customers in, so I went immediately to help wait on customers. She went back to the store with it a very short while, virtually 15 minutes, 20 or 25 minutes.

PRESIDING EXAMINER: You knew if Lawyer Schenck wanted it, it might be important one way or the other to Mr. Watts, didn't you?

THE WITNESS: Sure, I did. I didn't know what it was until I got over there.

PRESIDING EXAMINER: But you still didn't talk to Mr. Watts about it before the girl --

THE WITNESS: No, sir, I did not.

PRESIDING EXAMINER: All right; thank you. Any further questions, gentlemen?

MR. PEILLY: No further questions.

PRESIDING EXAMINER: Thank you very much; you are excused.

* * *

1314

DALTON PAXTON

was recalled as a witness and testified further as follows:

DIRECT EXAMINATION

BY MR. BOOTE:

* * *

Q Mr. Paxton, there has been testimony in this record concerning a visit by Vernon Pressley to your office in the WHIT Building late in November or early in December, 1959. Did Mr. Pressley make such a visit to your office?

A Yes, sir.

Q And did you meet with him at that time?

A Yes, sir.

Q Will you please tell us how that meeting occurred and what happened?

A Joe Pressley, the brother to the Pressley I met with, stopped me one day and asked me to consider giving his brother Edgar a job, that since he had filed his application he had been out of work for about nine months and he really needed some income.

I told Joe that it didn't appear to me to be a very satisfactory proposition because I really was not interested in keeping my future competitor in touch with my clients, but if he insisted, I would be glad to talk to him. I asked that he call me.

Q By "he" you mean you asked Vernon to call you?

A Yes, Vernon to call me. He did later that day and

we set up a meeting for nighttime at my station, at my office.

Q Did Vernon Pressley visit you in your office at night?

A Yes.

Q Did you meet with him in your office?

A Yes, sir.

Q Was it after dark?

A Yes, sir.

Q How do you fix the time in November-December, 1959?

A Well, because his pitch to me was --

Q Whose pitch?

A Edgar's pitch to me or Vernon's pitch to me was the fact that he could do so much for us on our Christmas business
1316 that was coming up since this was right before the Christmas
selling season. This is the only way I can pinpoint it. I
can't give you the exact date, but I know it was right before
the Christmas selling season started.

Q And do you tie that date in with any other subsequent
event which occurred a few days later?

A No, I can't --

Q Was Mr. Vernon Pressley later employed by the Canton
Enterprises?

A Yes. Roy Lucas called me and asked would I recom-
mend -- and Roy is the Editor of the Canton Enterprises -- and
he asked would I suggest or would I recommend Pressley to him
or what did I know about Mr. Pressley. I told Roy he had been

over to see me and asked for a job but I didn't hire him, but I wouldn't make any recommendation to Mr. Lucas of him.

Q Do you know whether, of your own knowledge, if Vernon Pressley did go to work for Mr. Lucas in Canton Enterprises?

A Yes, I know he worked there, yes.

Q Mr. Paxton, there is testimony in this record by both Vernon Pressley and Joe Pressley concerning two meetings which they held with you early in April, 1960. Did you have two meetings with Vernon and Joe Pressley early in April, 1960?

A Yes, sir.

Q Will you please tell us the first meeting, including
317 where and when it was held?

A The first meeting was held in Sluder Furniture Company, right in downtown Canton. I was downtown, soliciting business, and I was approached by both Pressleys on the street and they had a few things they wanted to talk to me about. I said, "Okay, let's walk in this furniture store, where we can be comfortable, where we can talk about it." We went in and talked about 30 minutes.

Q Tell us the conversation, please.

A Well, basically, the proposition from them, they would like to buy the outstanding stock in WWXT, except that portion which I held, and they wanted me to make arrangements for them to get it.

Q And did you give them any response to this proposal or suggestion to make purchase of the stock of WHIT?

A Not at that time.

Q Was there anything said during that discussion with respect to the pending application of Mr. Pressley for a new station in Canton?

A Well, they said the reason they could buy the stock in WHIT was because their frequency would fit in another town, which was not specified, and that they could amend their application to this town and then they could come up with two stations.

Q You say "they" said --

1318

A The Pressleys.

Q Do you know what was said by Vernon and what was said by Joe?

A No; there were three of us and we were talking back and forth. I don't believe I could distinguish who said what or recall who said what.

Q Did you discuss with any of your fellow stockholders in the licensed corporation WHIT the possibility that they might sell their stock to the Pressleys?

A Not at that time.

Q At the meeting in Sluder's Furniture Store, did the meeting break up with some agreement or promise that you would meet again in the near future?

A Yes, sir.

Q And what arrangements were made?

A Just that I would think about it and be back in touch with them.

Q What did you do after that meeting?

A Some time later I contacted one of them -- I don't remember which one -- and set up a meeting for my office at nighttime.

Q Was the contact made by telephone?

A I am not sure.

Q And how long -- Well, was there a second meeting in your office?

319 A Yes, sir.

Q And do you remember the dates of those meetings or how long apart, how far apart they were held?

A Possibly three or four days, maybe five. I couldn't even be sure they were in the same week, but probably it was in a seven-day period or five-day period. I couldn't state that --

Q Did you make any notes or any memorandum of these meetings which would enable you to refresh your recollection as to the dates or what was said?

A No, sir.

Q Now will you please tell us of the second meeting, the one in your office a few days after the meeting in Sluder's Furniture Store?

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A Sir, in this meeting, I told the Pressleys that I didn't want to go to our stockholders with that proposition where I was to buy them out and I was to be made part of the Station. I didn't know if it would set too well with them or not. They counteroffered they would buy all of the outstanding stock.

Q Now, were these offers in a legal sense or just discussions of what they might do?

A No; discussions. They would say, "We will give you so much for it and you have to have it by a certain day" -- that didn't occur, no, sir; just discussion.

1320 Q Was there any discussion at that meeting as to the possibility that Mr. Vernon Pressley might discuss his application in return for something you might do or the owners or licensee of WWIT might do?

A No, sir; the only reference that I recall to his application was the fact that it would work in another town and they could amend it so they could be moved.

Q Was there any offer made by you or any suggestion made by you that Mr. Pressley might be willing to dismiss his application in return for payments of some money?

A No, sir.

Q There has been testimony to the effect that you asked, toward the close of that meeting, if he or Mr. Vernon Pressley would be interested in something under the table. Did you make

any such statement?

A No, sir, I didn't.

Q There has been testimony some gesture was made by your hands under your desk or under a table of some sort towards the end of the meeting. Do you recall making any such gestures?

A No, sir.

* * *

1326

Q Now, Mr. Paxton, there is testimony in this record which establishes that Mr. Slatkin assisted in the preparation of Mr. Bryant's application and that Mr. Slatkin was present in Mr. Bryant's home on Wednesday, April 27, 1960. The next series of questions relate to that testimony. From time to time, did full-time employees of WHIT have additional, part-time jobs?

1327

A Yes, sir, many times.

Q Does or has WHIT any company policy with respect to part-time employment by full-time employees?

A We don't object to it as long as it does not interfere with their daily work.

Q In April, 1960, was Eugene Slatkin a full-time employee of WHIT?

A Yes, sir.

Q Did you employ Mr. Slatkin on behalf of WHIT?

A Did I interview and hire him?

Q Yes.

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A Yes.

Q At the time, did you know he had an application pending for a new station in Black Mountain, North Carolina?

A Yes, sir, I knew that.

Q What was your understanding as to how long Mr. Slatkin would remain in the employment of WHIT?

A Until he heard from his station and got a construction permit.

Q And was he then to terminate his employment or did you expect him to stay?

A No, sir; he was free to go as soon as he got notice.

Q What was Mr. Slatkin being paid during April, 1960 by WHIT?

A About \$50 a week.

1328

Q When Mr. Slatkin performed services in connection with Mr. Bryant's application on April 27, 1960, did you give any instructions to Mr. Slatkin as to what he was to do?

A No, sir.

Q Did you supervise in any way the work which Mr. Slatkin performed?

A No, sir.

Q Did Mr. Slatkin make any reports to you as to what he was doing in Mr. Bryant's home on that date?

A I don't recall any conversation.

Q Did you make any suggestions concerning or changes in

any material prepared by Mr. Slatkin on that date?

A No, sir.

Q Did you make any payment to Mr. Slatkin by check or in cash or in any other way on April 27, 1966?

A No, sir.

Q Did you make any payment or did WWIT ever make any payment to Mr. Slatkin in compensation for the services he had rendered on behalf of Mr. Bryant?

A No, sir.

* * *

1329

Q The record shows, Mr. Paxton, that negotiations for purchase of the stock, majority of the stock of Western North Carolina Broadcasters, Inc., were conducted in September or October, 1958 and that an application was filed sometime apparently in October, 1958 for transfer of control. Do you know if the Corporation and its selling stockholders were represented by a Communications counsel in Washington?

* * *

Q You know who Washington counsel was?

A Yes.

Q Who was it?

A Mr. Lovett.

Q What was his first name?

A Mr. Eliot Lovett.

* * *

1337

CROSS-EXAMINATION

BY MR. FLETCHER:

* * *

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1346

Q Mr. Paxton, you have testified that you had a night meeting sometime in November or December, 1959 with Mr. Pressley in your office at WWIT?

A Mr. Vernon Pressley.

Q Mr. Vernon Pressley. You testified at this time he had asked you for a job at WWIT, is that correct, sir?

A Yes, sir.

Q Now, Mr. Paxton, I believe you also testified that you considered Mr. Vernon Pressley potential competition in the market.

A Yes, sir.

Q Did you say anything to Mr. Joseph Pressley in preparation for this meeting that night that you would not want to hire your number-one competitor, specifically

1347

Mr. Vernon Pressley?

A I believe I said that to both of them.

Q Did you say that to Joe Pressley at the time this meeting was set up for that evening?

A Yes, I am sure I did.

Q Do you recall using those specific words --

A No, I don't --

Q -- "competitor"?

A No, I don't recall specifically.

* * *

Q Mr. Paxton, referencing the November-December, 1959 meeting with Mr. Joe Pressley at which time he asked you to

see Mr. Vernon Pressley on a matter of employment at WWIT, did you not indicate to Mr. Joe Pressley that it would be mighty poor business to hire your number-one prospective competition?

A Did I indicate that to --

Q Did you state that to Mr. Joe Pressley?

1348 A Mr. Joe Pressley?

Q Yes, sir.

A It is possible I said that. I think maybe I did.

* * *

1349 Q To the best of your recollection, sir, you considered it mighty poor business to hire your number-one competitor in the market, is that right?

A I would say yes, that is a reasonable assumption.

Q Did you in fact have that meeting with Mr. Pressley that night -- Vernon Pressley?

A Yes.

Q How long did that meeting last, sir?

A Thirty or forty minutes approximately; I don't recall exactly. It could be minutes each way.

* * *

1352 Q Mr. Paxton, you have testified to two meetings with Vernon and Joe Pressley during the first week or the early part of April, 1960, is that correct?

A Yes, sir.

Q One of which was in the Sluder Furniture Store and the second in office of WWIT?

A Yes, sir.

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from the original bound volume

Q You testified, sir, that a Pressley or two Pressleys indicated that they would wish to purchase all of the stock of WWIT except yours, is that correct, sir?

A Yes.

Q And on the basis of this offer, you set up a further meeting with the Pressleys later on in that week, is that correct?

MR. BOOTH: Mr. Examiner, I would object to the question insofar as the word "offer" is used. There was a discussion; I specifically tried to make sure that the record showed this was not an offer in the legal sense.

MR. FLETCHER: I will withdraw that.

BY MR. FLETCHER:

Q On the basis of a discussion, at which time there was some talk of obtaining all of the stock of WWIT, except your stock, a further meeting was set by you in the offices of WWIT?

1353

A Yes.

Q Is that correct?

A Set or agreed upon; I don't remember how it came about.

1361

Q Mr. Paxton, I am going to show you Mr. Slatkin's testimony as it appears on page 314 of our present record and again as it appears on page 337, and I would like you to look that over to refresh your recollection.

MR. FLETCHER: Was Mr. Paxton here when it was testified to?

MR. REILLY: Yes, he was; he was seated beside Mr. Booth.

BY MR. REILLY:

Q I think it goes over to 315, Mr. Paxton. Please read enough to satisfy yourself.

Have you finished, sir?

A I think so, yes.

Q Fine. With that as background, when Mr. Slatkin took the 50-dollar check to which we have reference, April 30, 1960, was it in payment for the services he rendered to Mr. Bryant on April 27?

A No, sir.

Q Did you at any time have a discussion during which Mr. Slatkin was present at which you indicated to him that the story that the check was in payment for his services in connection with the Tempo musical format was a fabrication to cover up the fact that it was in payment for services rendered to Mr. Bryant?

A No, sir.

Q Thank you. Now, again, looking to April 27 and a period of time while you were at Mr. Bryant's house, while you were present, did you in any way examine or review the work that Mr. Slatkin was doing for Mr. Bryant that day in connection with his application?

A No, sir.

* * *

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1363

REDIRECT EXAMINATION

BY MR. BOOTH:

* * *

1364

Q I have one other question. At the evening meeting with Mr. Pressley -- Vernon Pressley -- in late November or early December, 1959, at which the possibility of his being employed was discussed, was there a discussion also about the possibility of employing other individuals?

A Well, he made reference to the fact he had two brothers who took time off from their shift work to take a shift at work in their spare time to help him, on their days off -- "shift workers have long weekends," or something like that.

Q Who were those two brothers?

A Joe and C. J. Pressley.

1365

Q Have either or both of them worked as salesmen on a part-time basis for WWIT in the past?

A Yes, both of them have worked there.

* * *
RECROSS-EXAMINATION

BY MR. FLETCHER:

Q Mr. Paxton, does WWIT sell advertising in Asheville?

A Do we solicit in Asheville?

Q Yes.

A Yes.

Q Black Mountain?

A No, sir.

Q How far is Black Mountain from Asheville?

A Forty miles, maybe 35.

Q So you wouldn't consider Black Mountain as being in competition with WWIT?

A No, sir.

Q Not at all?

A No, sir.

* * *

[PRESSLEY EXHIBIT 1]

DISTRICT OF COLUMBIA

A F F I D A V I T

I, EUGENE SLATKIN, upon my oath, state that I am the same Eugene Slatkin mentioned in a certain Motion to Enlarge Issues and certain affidavits thereto attached which were filed before the Federal Communications Commission on the 24th day of April, 1961, relating to the application of VERNON E. PRESSLEY, et al., now before the Commission;

That, I am a longtime friend of B. E. Bryant, having known him from boyhood days;

That in April 1960, Mr. Bryant asked me, by way of friendship, to assist him in the preparation of an application in his name for Asheville, North Carolina;

That I did assist him in some respects for which I was compensated by Mr. Bryant in cash in the sum of Fifty Dollars (\$50);

That upon review of the application of Mr. Bryant as filed, I note that the application does not contain any of the materials which I prepared; and

That I categorically deny all other statements in said affidavit relating to my participation as alleged therein.

Subscribed and sworn to before me,

this ^{5th} day of May, 1961.

Thomas E. Arnold
Notary Public

Thomas E. Arnold

Eugene Slatkin
Eugene Slatkin - Affiant

My commission expires: *Sept. 14/1964*

[PRESSLEY EXHIBIT 2]

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

AFFIDAVIT

EUGENE SLATKIN, being first duly sworn, deposes and says:

That he is a citizen and resident of Buncombe County North Carolina; that said affiant has lived in Buncombe County, North Carolina since the 1st day of December, 1958, and that he is one of the shareholders of Radio Station WEMT, Black Mountain, North Carolina.

That the said affiant knows the said Vernon E. Pressley of Canton, North Carolina, who is employed by Radio Station WSKY, of Asheville, North Carolina; that said affiant has known Billy E. Bryant since he was a small child in Gastonia, North Carolina; that said affiant, and Billy E. Bryant are both originally from Gaston County, North Carolina.

That said affiant has been exclusively engaged in the radio business for the past 17 years. That said affiant is devoted to his profession and has always strived to maintain the highest character for himself and the station or stations where he was employed or either has interest in, with his dealings in regard to said business, professional conduct and associations with other members of the general public and business world.

That said affiant, EUGENE SLATKIN, has never, in any manner whatsoever, attempted to or had any intention of assisting anyone else, either directly or indirectly, to defeat, hinder, block, or delay the issuance of any radio station grant in this State or any other state.

That during the month of March, 1960, this affiant was employed at Radio Station WWIT, Canton, North Carolina; and that Dalton Paxton was the General Manager of said station.

That said affiant remained under the employ of Dalton Paxton, at WWIT, Canton, North Carolina until the last week of May, 1960; at which time the said affiant had received a grant for the station which he now owns interest in at Black Mountain, North Carolina, known as WBMT. That said affiant naturally had many conferences and conversations with Mr. Dalton Paxton, while in his employ, and on a few occasions casually talked with Joe Pressley.

That said affiant did assist the said B. E. Bryant in filling out an application for a radio station grant on 920 kilocycles during April, 1961; but that said affiant did not, of his own knowledge, attempt in any manner to assist anyone in furthering the purpose of creating a block of a grant for this frequency.

That said affiant only assisted B. E. Bryant after Dr. Dalton Paxton called him at his home in Black mountain, North Carolina at midnight the previous evening and directed him as his employee to meet Mr. Bryant at Mr. Bryant's home for the purpose of assisting B. E. Bryant in the preparation of his application. That Mr. Dalton Paxton informed this affiant, at that time, that Sam Patterson would work in his place that next evening while he assisted Mr. Bryant.

That the next day said affiant met Mr. B. E. Bryant at the entrance to Redwood Forest, sub-division, and upon arriving found Dalton Paxton with Mr. B. E. Bryant; whereupon affiant, Mr. Paxton, and B. E. Bryant, all went to the Bryant home in Redwood Forest, Buncombe County, North Carolina. That when said affiant arrived at the Bryant home with Mr.

Paxton and Bryant, the following people were present in addition to those hereinbefore mentioned; Hal Edwards, and Mrs Marsha Bryant.

That affiant arrived at the Bryant home some time past 9 o'clock A.M. and left at approximately 6 o'clock P. M. that day.

That Dalton Paxton gave B. E. Bryant a check after receiving a telephone call, that B. E. Bryant stated that he had to leave at that time so they would not come in contact with Mr. Joe Cole, whom, they stated was to arrive at 2 P.M.

That Hal Edwards returned at approximately 5 to 5:30 o'clock P.M. to the Bryant home and in the presence of Mr. Joe Cole, and this affiant, gave the impression that he didn't know what was going on, and after he was told, he laughingly stated "What do you want with a radio station?"

That the only transaction that took place, or comment or suggestion was directly related to filling out the answers to the many questions contained in said application; there being no direct statements made by any of the parties concerning the blocking of any application made by any person. That this affiant had the impression at the time of filling out the application, that this affiant had several conversations with Joe B. Pressley, the brother of Vernon E. Pressley, regarding the application of the said Vernon E. Pressley to the Federal Communications Commission for a construction grant for a radio station on 920 k.c., that on or about the twenty-fourth day of April, 1960, Joe Pressley had a conversation with one Eugene Slatkin, who was then an employee of Radio Station WWIT in Canton, North Carolina; that at that time the said Euguen Slatkin discussed this then pending application for a new radio station in Black Mountain, North Carolina and about the application of Vernon E. Pressley for a construction

permit for a radio station in Canton, North Carolina on 920 d.c.; that during said conversation the said Euguen Slatkin stated to Joe Pressley that he had heard Dalton Paxton state he had several telephone conversations wherein he, Dalton Paxton, had called upon various persons, urging them to file an application on 920 k.c. in some town near Canton, North Carolina; that upon leaving the said Slatkin he stated that he would see me at a later date and we would talk further.

That on the 25th day of April, 1960, Eugene Slatkin called Joe Pressley on the telephone and stated that he wanted to meet him downtown in order to tell him something of importance without Dalton Paxton knowing of the conversation; that Joe Pressley pursuant to said telephone call, met the said Eugene Slatkin on that date and at said meeting the said Eugene Slatkin related the following to Joe Pressley: The said Slatkin stated that on Wednesday April 27th, 1960, he, at the suggestion of Dalton Paxton, went to the home of B. E. Bryant at No. 19 Crockett Avenue, in Asheville, North Carolina. The said Slatkin further stated to Joe Pressley on said occasion that he saw the said Dalton Paxton deliver to the said B. E. Bryant a check in the amount of \$500.00; that at this point Joe Pressley desires to state that Mrs. Robert E. Green, an employee of Radio Station WWIT during 1960, Frieda Burress, the bookkeeper for Radio Station WWIT, and Robert H. Burress, the husband of the said Fredia Burress, have stated to this Joe Pressley, that they have seen said cancelled check dated April 27, 1960.

That this party Eugene Slatkin states that B. E. Bryant gave him the sum of \$50.00 in cash for said affiants assistance in preparing said application and furthermore that this affiant was not paid by Dalton Paxton the sum of \$50.00 by check, as he has been alleged heretofore.

That for purposes of clarification Dalton Paxton did pay said affiant by check the sum of \$50.00 for extra work at the station while said affiant was under his employ in preparing a format for an all day musical program which did not come within the requirements of said affiants employment.

That only persons present when Mr. B. E. Bryant gave affiant the sum of \$50.00 hereinbefore set forth, were the two parties.

The said affiant did not go with either B. E. Bryant or Dalton Paxton to Washington for the purpose of filing this application, but does know that B. E. Bryant and Dalton Paxton went together the next day to file said application.

That said affiant did go with Dalton Paxton and B. E. Bryant to Washington during the Month of May, 1961, after the notice to broaden the issues in Vernon E. Pressleys application had been filed, said affiant going to Washington for the prupose of executing an affidavit in regard to matters contained in said application to broaden the issues of Vernon E. Pressleys application.

That said affiant did not pay any of his expenses personally for transportation, loging or otherwise in making said trip to Washington; but that Dalton Paxton had a trade agreement through his radio station with Piedmont Airlines whereby transportation was provided for all three parties. Food and lodging was paid by both parties.

That said affiant has overheard Dalton Paxton discussing Vernon E. Pressleys application for a grant of 920 k.c. and has heard him state that it would be very detrimental to his economic situation in general in this area.

That approximately two weeks ago this affiant was contacted by B. E. Bryant and Dalton Paxton and at their request this affiant met them at the office of B. E. Bryant; that they stated to this affiant that they wanted to know what was going on with regard to an action brought against this affiant by Vernon E. Pressley; that he said Bryant and Paxton stated that they would bear the legal expense for this affiant but this was refused by this affiant; that on this occasion the said Dalton Paxton stated in the presence of B. E. Bryant that he believed that they were in good shape and that he had talked to his attorney in Washington about the matter.

Further this affiant saith not.

/s/

Affiant

Sworn to and subscribed before me, this the 9th day of September,
1961.

/s/ Carroll Fowler
Dep. Clerk Gen. County Court
Buncombe County, North Carolina

[PRESSLEY EXHIBIT 3]

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE
A F F I D A V I T

EUGENE SLATKIN, being first duly sworn, deposes and says as follows:

(1)

That he is a citizen and resident of Buncombe County, North Carolina; that said Affiant has lived in Buncombe County, North Carolina since December, 1958.

(2)

That said Affiant now executes this Affidavit and refers to the Affidavit executed by him on or about the 9th day of September, 1961 and also the Affidavit executed by him in the District of Columbia on the 5th day of May, 1961.

(3)

That said Affiant now refers to the Affidavit executed by him on or about the 5th day of May, 1961, wherein said Affidavit did not set forth any specific dates, times or places in regard to the information contained therein.

(4)

That in said Affidavit executed on the 5th day of May, 1961, this Affiant referred to his friendship with one B. E. Bryant and that he assisted him in preparing an application for a permit or license for the grant of broadcast rights in Buncombe County, North Carolina; but that said Affiant did not refer specifically as to any time, conference or other parties present while assisting said B. E. Bryant with the application.

(5)

Said Affiant now refers to the Affidavit executed by him on or about the 9th day of September, 1961 wherein this Affiant executed said Affidavit on the 9th day of September, 1961 as an explanation and clarification of the Affidavit that was executed in May, 1961.

(6)

That said Affiant executed the Affidavit on the 9th day of September, 1961 so as to explain the full transactions, associations and to clarify and correct the Affidavit executed by him on the 5th day of May, 1961.

(7)

That said Affidavit executed on the 9th day of September, 1961 fully explains the meeting, transactions, and identifies all parties present their connection with, if any, said application by B. E. Bryant at the home of B. E. Bryant during April, 1960.

(8)

As a further explanation of both of the Affidavits heretofore executed by this Affiant, B. E. Bryant did call this Affiant and ask him to assist him in the preparation of said application and also this Affiant's employer at that time, Dalton Paxton, also called this Affiant and saw him personally and asked him to assist in the preparation of said application, and further this Affiant saith not.

/s/ Eugene Slatkin
Affiant

SWORN to and subscribed before me this the 24 day of
November, 1961.

/s/ Nancy L. Pope (SEAL)
Notary Public

My Commission Expires:
11-3-63

[PRESSLEY EXHIBIT 7]

STATE OF NORTH CAROLINA
COUNTY OF MAYWOOD

THIS CONTRACT AND AGREEMENT, Made and entered into this ___ day of December, 1958, by and between WESTERN NORTH CAROLINA BROADCASTERS, INC., hereinafter referred to as party of the first part; and B. M. MIDDLETON AND KERMIT EDNEY, hereinafter referred to as parties of the second part;

WITNESSES:

That the party of the first part employs the parties of the second part, or the survivor or successor, in the case of the previous death of either, for the sum of Fourteen Thousand Four Hundred Dollars (\$14,400) a year, for a period of five (5) years beginning January 1, 1959, to serve the Corporations in a consulting capacity to the extent they may be called upon, and such services may be performed by either Middleton or Edney or, in the event of the death of both, by the then president of Radio Hendersonville, Inc.

It is agreed that the \$14,400 shall be paid at the rate of \$1,200 per month for a period of five years to the person designated from time to time by Middleton or Edney, or in the event of the death of both prior to the expiration of this term, by the then president of Radio Hendersonville, Inc., always provided that this payment and this amount for this term shall be made.

In the event these monthly payments become two months in arrears then the entire amount contracted for, at the option of the agent entitled to receive it for the balance of the stipulated period, shall become due and payable immediately.

And the said Middleton and Edney who execute these presents for the purposes expressed, do hereby designate First Union National Bank of North Carolina, Hendersonville, North Carolina, as the agent to whom these payment shall be made.

In consideration of the foregoing the parties of the second part for themselves agree to perform such consulting services as they or their survivor or successor may be called upon.

IN TESTIMONY WHEREOF, the said party of the first part has hereunto set its hand and affixed its seal all by order of the Board of Directors, and the parties of the second part have hereunto set their hands and seals the day and year first above written.

WESTERN NORTH CAROLINA
BROADCASTERS, INC.

BY

/s/ Sidney A. Watts (SEAL)
President

ATTEST:

/s/ Freda H. Burress
Secretary

/s/ B. M. Middleton
B. M. MIDDLETON (SEAL)

/s/ Kermit Edney (SEAL)
KERMIT EDNEY

STATE OF NORTH CAROLINA
COUNTY OF MAYWOOD

Personally appeared before me this day Sidney A. Watts and after being by me duly sworn, says that he is the president and Freda H. Burress is the Secretary of WESTERN NORTH CAROLINA BROADCASTERS, INC., the corporation described in and which executed the foregoing instrument; that he knows the common goal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and that the name of the corporation was subscribed thereto by him the said President; and that he and the said secretary subscribed their names thereto, and the said common seal was affixed all by the order of the Board of Directors of said corporation, and that the said instrument is the act and deed of said corporation.

WITNESS my hand and notarial seal this 22nd day of December, 1958.

/s/ Kate Williamson
NOTARY PUBLIC

My commission expires:
9-11-59

STATE OF NORTH CAROLINA
COUNTY OF NORTH CAROLINA

Personally appeared before me this day B. M. MIDDLETON AND KERMIT EDNEY and acknowledged the due execution by them of the foregoing Contract and Agreement.

WITNESS my hand and notarial seal this 22nd day of December, 1958.

/s/ Kate Williamson
NOTARY PUBLIC

Contract and Agreement

And the said Middleton and Edney who execute these presents for the purpose expressed, do hereby designate First Union National Bank of North Carolina, Hendersonville, North Carolina, as the agent to whom these payments shall be made.

In consideration of the foregoing the parties of the second part for themselves agree to perform such consulting services as they or their survivor or successor may be called upon.

IN TESTIMONY WHEREOF, the said party of the first part has hereunto set its hand and affixed its seal all by order of the Board of Directors and the parties of the second part have hereunto set their hands and seals the day and year first above written.

WESTERN NORTH CAROLINA
BROADCASTERS, INC.

BY /s/ Sidney A. Watts (SEAL)
President

ATTEST:

/s/ Freda H. Burress
Secretary

/s/ B. M. Middleton (SEAL)
B.M. MIDDLETON

/s/ Kermit Edney (SEAL)
KERMIT EDNEY

[WWIT EXHIBIT 2]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

B
FCC 63-628
37510

In the Matter of)

Revocation of the License of)
Eugene and David P. Slatkin d/b as)
Mountain View Broadcasting Company)
for Standard Broadcast Station WBMT)
Black Mountain, North Carolina)

DOCKET NO. 14907

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Cox not participating.

1. By its Order released January 8, 1963, the Commission directed Eugene and David P. Slatkin d/b as Mountain View Broadcasting Company (Mountain View), licensee herein, to show cause why an order revoking Mountain View's license for Standard Broadcast Station WBMT, Black Mountain, North Carolina, should not be issued. The Order alleged, among other things, that it appeared that evidence available to the Commission with respect to (1) licensee's misrepresentations as to financial qualifications; (2) concealment from the Commission of the dissolution of licensee partnership; (3) misrepresentation in numerous applications filed with the Commission of the legal status of the applicant; (4) construction, operation and assumption of control of Station WBMT by persons other than the dissolved partnership and (5) false statements knowingly made to the Commission by Eugene Slatkin in his verified statement of January 31, 1962, as well as in the affidavit he executed on May 5, 1960 in connection with the B. E. Bryant application for construction permit, raised serious questions, best resolved in a hearing, as to whether Station WBMT was constructed and had been operated without a license or other valid authorization in willful violation of Sections 301 and 310(b) of the Communications Act of 1934, as amended; and as to whether Eugene Slatkin has the character qualifications to be a broadcast licensee.

2. Pursuant to Section 1.78 of the Commission's Rules, the licensee on February 4, 1963, filed a Petition for Waiver of Hearing. Thereafter, the Review Board entered an Order terminating the hearing and certifying the case to the Commission for disposition. Licensee timely filed a Statement in Mitigation, which, together with other pertinent information, in accordance with Section 178(d) of the Rules, including a report of a field investigation, is now before us. 1/

1/ Although the Statement in Mitigation is filed on behalf of the partnership, it is restricted to matters pertaining to Eugene Slatkin. As indicated by documents filed with the Commission, David Slatkin has severed all personal ties with Eugene Slatkin and has had no further interest in WBMT since the partnership was dissolved on March 3, 1960. See Paragraph 11, infra.

- 2 -

3. For purposes of clarity, the various issues stated in the Order to Show Cause as well as licensee's contentions and responses thereto, are treated under separate topic headings with the facts pertinent to each heading contained therein.

Financial Qualifications of Applicant

4. On September 12, 1958, an application (BP-12374) for construction permit for Station WENT was filed by Eugene Slatkin and David P. Slatkin, a partnership tr/as Mountain View Broadcasting Company. ^{2/} This application was subsequently amended as to frequency, antenna system, program proposals and financial qualifications of both partners, and was granted without hearing on May 4, 1960. The application was signed only by Eugene Slatkin as partner, but was accompanied by a partnership agreement dated September 1, 1958 signed by both Slatkin brothers. The original application of September 12, 1958, for the Black Mountain construction permit stated that the net worth of Eugene Slatkin was more than \$20,000; that he was in a position to supply at least \$8,000 for the operation of the station; that the net worth of David P. Slatkin was more than \$24,000 and that he was in a position to supply at least \$8,000 for the operation of the station. Subsequently, during the pendency of the application, Eugene Slatkin on March 25, 1960 (signing as partner), submitted balance sheets for himself and David P. Slatkin, dated March 23 and 18, 1960, respectively, representing the net worth of Eugene Slatkin as of that date to be \$36,757 and the net worth of David P. Slatkin to be \$18,800, and listing among Eugene Slatkin's assets the sum of \$7,000 "cash in bank," deposited with Northwestern Bank of Black Mountain, North Carolina.

5. The \$20,000: When interviewed by members of the Commission's staff in June, 1962, Eugene Slatkin admitted that his net worth as of September 1958 was far less than \$20,000. In fact, he stated that he was forced to sell his interest in Station WADA, Shelby, North Carolina, in August, 1958 because he had no more money to put into the station, which was losing money, and he had no further resources. He also stated that at the time he was "out of resources," that he was "down to five or six dollars in the bank," and that "I had no more money to live on, let alone to operate it [WADA]." Licensee's Statement in Mitigation is silent with respect to the \$20,000.

6. The \$8,000: The Statement in Mitigation contends that the \$8000 figure was derived from \$5000 from the sale of Eugene Slatkin's interest in WADA at Shelby, from \$825 profit from the sale of his heavily mortgaged Shelby home, and that Slatkin also "took into consideration" the \$4,800 yearly net income of his wife's beauty shop business. In June, 1962, Slatkin told Commission staff members that he was sure he received only \$1,000 from the sale of his interest in WADA, despite the fact

^{2/} Although the original application used the phrase "tr/as Mountain View Broadcasting Company," a letter received from Eugene Slatkin on March 25, 1960, requested that the applicant be shown thereafter as "d/b as Mountain View Broadcasting Company."

- 3 -

the sales contract recites payment of \$5000; that, in any event, he put all of his cash into a house at Black Mountain and that he was wholly without funds and "out of work for ten months from 1958 to the fall of 1959." Certainly the amount of income from his wife's beauty shop could not be considered readily available funds as contended. Even assuming that Slatkin was paid \$5,000 for his interest in WADA he was never in a position to supply \$8,000 for the operation of the proposed Black Mountain Station.

7. The \$36,757: The Statement in Mitigation makes no attempt to substantiate the claim, in the amended financial statement of March 25, 1960, that Eugene Slatkin's net worth as of March 23, 1960, was \$36,757-- a claim so false as to border on the ridiculous in the light of Slatkin's own statement to the Commission's staff in June, 1962. Slatkin's net worth in March 23, 1960 appears to have been far less than \$10,000.

8. The \$7,000 "cash in bank": The evidence available to the Commission indicated that the \$7,000 which Slatkin claimed as his own deposit as of March 23, 1960, actually was not deposited until May 27, 1960 and then not by Slatkin but by Gordon H. Greenwood with whom Slatkin had a written agreement that in return for supplying \$7,500 to the station, Greenwood was to become 50 percent owner of a corporation to which the license would be assigned. The Statement in Mitigation characterizes Slatkin's misrepresentation as a lack of "discretion" and alleges that Slatkin "projected" the sum from a letter of credit intent from a local bank. However, the letter of credit intent was not issued to Slatkin personally but to Mountain View Broadcasting Company, the name of the new corporation formed to operate and control WBMT, for which Greenwood was to supply the \$7,500. In issuing its letter of credit intent the bank relied primarily upon Greenwood. We are unimpressed with licensee's attempt to explain away a patent falsehood to the Commission.

9. The Shelby application: In various documents submitted to the Commission in connection with an application for a construction permit of a standard radio station at Shelby, North Carolina (BP-10921) Slatkin stated his net worth as in excess of \$20,000 in 1957, and that he was in a position to supply at least \$8,000 for the operation of the station. In a later amendment in 1958 he stated his net worth as \$13,743. Evidence available to the Commission indicates that Slatkin's net worth in 1957-1958 was substantially less than either of the two figures. At the time in question the bulk of his assets consisted of \$3,300 from his mother's estate and \$1,500 from the sale of his residence in Lincolnton, North Carolina. Nor is there evidence that Slatkin was ever in a position to supply \$8,000. In fact, he informed the Commission's staff that he soon ran out of cash and had to borrow \$500 from his brother David. The Statement in Mitigation claims that in January 1958, Eugene Slatkin had available a "loan" from a Lincolnton bank in the amount of \$10,000. Here again, the promise of a loan was not to Slatkin personally but to the applicant partnership, and it is probable that Slatkin's partner in the Shelby application was the individual upon whom the bank relied in extending credit.

- 4 -

10. The Hendersonville application: Eugene Slatkin claimed in an application dated August 3, 1961, for a construction permit of a standard radio station at Hendersonville, North Carolina (BP-15026), that he had a net worth in excess of \$25,000 and that he was in a position to supply \$8,000 in the operation of the station. Facts available concerning Slatkin's financial position at this time can lead only to the conclusion that these figures were highly exaggerated. It is claimed in Slatkin's behalf that the figures were not given to the Commission as a deliberate misrepresentation although they were admittedly "premature in point of time." According to the Statement in Mitigation, Slatkin expected to receive \$17,000 from an "executed contract" for the sale of his interest in WBMT. In actual fact, however, no contract for the sale of Slatkin's interest in WBMT was executed until six weeks after the Hendersonville application was filed. Even in this contract Slatkin was not to receive the full \$17,000, since the agreement stipulated that the sum of \$4,000 plus interest was to be deducted from the \$17,000. The amount to be deducted was lent Slatkin on a note co-signed by Greenwood and secured by 53 percent of Slatkin's stock in a corporation which he and Greenwood had formed to take over control of WBMT.

Concealment of the Dissolution of Licensee Partnership

11. The Statement in Mitigation acknowledges that the partnership of Eugene and David P. Slatkin, applicants for the construction permit for the Black Mountain, North Carolina station, was dissolved as of March 3, 1960; that no amendment as to ownership was filed between that time and the grant of the construction permit on May 4, 1960, and that although the partnership had been dissolved, numerous applications and other official documents were submitted to the Commission by Eugene Slatkin on behalf of the partnership. Slatkin offers the following justification for his continued concealment of the partnership dissolution from the Commission:

(a) That at the time the construction permit was granted (two months after the partnership dissolution); he and Gordon H. Greenwood were "well under way" with their agreement to form a corporation to operate the Black Mountain Station and therefore "it was believed expedient to finalize the corporation and file an assignment application to reflect the proposed legal status of the permittee";

(b) That after an application for assignment of the construction permit from the non-existent partnership to the corporation had been filed with the Commission on August 5, 1960, and returned as unacceptable for filing, it was believed that a second assignment application had been filed, and "great confusion resulted" thereafter as to whether the permittee or the licensee was the partnership or the corporation; 3/

3/Although it is contended that a corrected application was subsequently sent to the Commission, neither the Commission nor Washington counsel for WBMT has any record of having received the application in question.

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(c) That the last assignment application (filed on October 31, 1961 and refiled on November 14, 1961) "had to be signed by the partnership since the partnership is the listed licensee of WBMT at the Commission."

(d) That the 1960 applications submitted in the name of the partnership after the partnership had been dissolved were submitted "with the immediate anticipation that the application of assignment to the impending corporation would facilitate the showing of the actual legal status of the parties in a single application."

12. With respect to (a) above, the fact that Eugene Slatkin was engaged in forming a corporation to which he thought the construction permit would be assigned was no justification for concealing from the Commission the fact that two months before the CP was granted and nine months before the license was granted, the partnership to which the Commission believed it was granting the license had in fact ceased to exist. Slatkin makes no claim that he was unaware of the obligation to file applications for the assignment of the original CP from the partnership to him individually and then from him to the corporation. Slatkin had been instrumental in preparing the applications and other documents for the station in Shelby, North Carolina. He admitted to the staff that he was well aware of the Commission's requirements. The reason he gave to the staff for his failure to file either an ownership amendment or an application for assignment from the partnership to him was that he thought such a filing would delay the grant, and he wanted to get the station on the air for the 1960 summer tourist trade.

13. Similarly, with regard to the justification advanced in (b) above, Slatkin acknowledged that he knew that the application for assignment from the partnership to the corporation had never been granted because he received no notification from the Commission of such a grant. He also acknowledged that he knew that the fact that a telegram from the Commission of August 16, 1960 was mistakenly addressed to "Mountain View Broadcasting Company, Inc.," did not signify the Commission's approval of the assignment application. Finally, he acknowledged that a Commission telegram of December 13, 1960, addressed to "Mountain View Broadcasting Company" likewise did not signify Commission approval of the assignment, 4/ particularly in view of the fact that the original partnership had listed itself with the Commission as "doing business as Mountain View Broadcasting Company." Greenwood and his local attorney may well have assumed that the application for assignment had been approved, since they were unfamiliar with the procedure involved and may have assumed that Slatkin had in fact filed a second application for assignment to the corporation after the application of August 5, 1960, had been returned as unacceptable. However, Eugene Slatkin was well aware of the Commission's relevant Rules and Regulations and there is no evidence to support Slatkin's claim that he was confused.

4/ The Corporation and the licensee partnership were both named Mountain View Broadcasting Company. The Corporation was composed of Greenwood and Slatkin and their respective wives.

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14. The argument advanced in (c) above in justification of the fact that the final assignment application was signed by the non-existent partnership requires no rebuttal. The fact that the Commission's records listed the partnership as the licensee, whereas the licensee ceased to exist some 18 months previously, was no justification for misrepresenting the partnership as still being in existence and as being competent to apply for assignment of its license to another party. It is true, as stated in (d) above, that in the spring and early summer of 1960, Slatkin anticipated speedy Commission approval of his application for assignment of the construction permit from the partnership to the corporation, but he had no justification, then or later, for seeking to conceal from the Commission the fact that the partnership had ceased to exist as of March 3, 1960. Had Slatkin been willing to follow the required procedure, he could have amended his original application to reflect the change in the status of the applicant. He chose to ignore the requirements of the Communications Act in order to get on the air in time to take advantage of "the summer tourist trade" and thereafter, until the Commission learned the true facts in 1962, he continued to ignore the law and to misrepresent, in numerous documents filed with the Commission, the identity of the parties in control of Station WBMT. 5/

Ownership and Control of Station WBMT

15. No attempt is made to deny that more than half of the funds used in the purchase of real and personal property for the station and for its construction was supplied by Gordon H. Greenwood; that since June 14, 1960, the financial and business operations of the station have been controlled and conducted by a corporation which is not the licensee; that many contracts on behalf of the station have been executed in the name of the corporation; that all property and equipment except the land on which the station is located were purchased by the corporation; that federal and state tax returns have been filed in the name of the corporation and that the station's bills have been paid on checks which bear the name, "Mountain View Broadcasting Co., Inc." Although Slatkin, as manager and 50 percent owner, may in fact have supervised construction of the station, hired station personnel and directed the programming, it is clear that complete financial control (and ultimate control of all other matters as well) was in the corporation, and that Slatkin's verified statement submitted to the Commission

5/ The documents submitted to the Commission executed by Eugene Slatkin on behalf of the non-existent partnership of Eugene and David P. Slatkin included: (1) Statement of ownership filed on June 28, 1960; (2) Application to modify construction permit filed on June 16, 1960; (3) Request for program test authority filed on August 5, 1960; (4) Application for license, filed on August 5, 1960; (5) An unaccepted application for consent to the assignment of construction permit to the Mountain View Broadcasting Company, a North Carolina Corporation, submitted on August 5, 1960; (6) Application for consent to the assignment of license to the Mountain View Broadcasting Company (the corporation), tendered for filing on October 31, 1961, and refiled on November 14, 1961.

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February 1, 1962, contained false and misleading statements as to the corporation's ownership of the station and the corporation's role in the construction, operation and maintenance of the station. 6/ The same statement claimed that Slatkin had been present and managed WBMT since the beginning of its construction and still was supervising the station. In fact, he had abandoned management and such degree of control as he had possessed on or about October 16, 1961, and did not resume management until July 1962, after the Commission's field investigation had been completed. The Statement in Mitigation concedes that Slatkin's statement was "misleading" and "should not be condoned," but claims that it should not in and of itself warrant revocation. However, the Commission is faced not only with a false affidavit by Slatkin, but must consider the fact that Slatkin willingly turned over ownership and financial control of the station to a corporation which was never the licensee of Station WBMT. His falsehoods in the "verified statement" of February 1, 1962, reprehensible enough in themselves, were designed to conceal various previous acts which he knew to have been in violation of the Act and of the Commission's Rules.

False Statement by Slatkin in Affidavit of May 5, 1960

16. The Statement in Mitigation concedes that, as alleged in the Order to Show Cause, Slatkin signed an affidavit on May 5, 1960, regarding the filing of an alleged "strike" application by B. E. Bryant for a construction permit at Asheville, North Carolina (BP-12872; Docket No. 14007), which he knew to contain false statements. The proceeding in Docket No. 14007 involved, in part, an application by one Vernon E. Pressley for a new broadcast station at Canton, North Carolina. The issues in the proceeding were enlarged to include an issue to determine whether the application of B. E. Bryant, a mutually exclusive application filed for a facility in Asheville, North Carolina, was filed in good faith or to strike or block the application of Vernon E. Pressley. It was alleged and contended that Radio Station WWIT, the existing station in Canton, North Carolina, was the moving force behind the application of B. E. Bryant. At the time in question, Eugene Slatkin was working at WWIT and helped prepare the application of Bryant. Apparently, Slatkin related the circumstances surrounding the Bryant application to one Joseph Pressley, the brother of Vernon E. Pressley. Joseph Pressley submitted an affidavit in support of the motion to enlarge the issues setting forth the information told to him by Eugene Slatkin relating to the circumstances

6/ Although the entire financial operation of WBMT since the construction permit was granted has been controlled by the corporation, Eugene Slatkin stated, among other things, that: "The corporation above referred to has never functioned since the organizational meeting in any respect to the construction, operation or maintenance of Radio Station WBMT, and no property has been conveyed to said corporation or by said corporation concerning said radio station or its operation." It is interesting to note that the comment is contained in the Statement of Mitigation that "...some funds supplied by Mr. Gordon Greenwood were used in the construction of WBMT and some of the activities of Eugene Slatkin were made on behalf of the corporation..."

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surrounding the Bryant application. On May 5, 1960, Eugene Slatkin made an affidavit generally denying the allegations in the Joseph Pressley affidavit. His affidavit of May 5, 1960, he later admitted in testimony during the hearing, he knew contained false allegations and would be submitted to the Commission. On September 4, 1960 he made a second affidavit contradicting many of his statements in the first affidavit. Finally, he made a third affidavit in which he sought to explain the reasons for his falsehoods in the first affidavit; principally, that he had a good social relationship with the persons at whose behest he had made the false affidavit and that it would have been embarrassing to tell the truth about his role in the "strike" application.

17. In mitigation, it is claimed, in effect, that although the first affidavit constituted a general denial of certain allegations which were basically true, he made the general denial because of "what he termed certain discrepancies in dates and other matters" set forth among the allegations. Therefore, it is claimed, Slatkin's affidavit, "though incorrect in total, was not false." It is also stated that Slatkin, some four months later, "voluntarily" submitted the second affidavit in which he told the truth. According to the Commission's information, Slatkin's general denial in his affidavit of May 5, 1960, can hardly be justified on the grounds that some of the facts he denied were not actually true. The facts which were not true, and therefore justifiably denied, were relatively minor items, such as exact dates and times of certain meetings and transactions; as stated in his later affidavit, the allegations of substance which he had denied on May 5 were in fact true. The Commission is unimpressed with the present effort to justify or extenuate a false affidavit by claiming that certain unimportant portions of it were true. Nor is it impressed with the assertion that, some months later, he "voluntarily" revealed the truth. The evidence in Docket No. 14007 indicates that Slatkin did not come forward with the truth until after he had been threatened by Vernon E. Pressley with civil action for having given a false affidavit which had caused damage to Pressley.

Conclusions

18. We have considered and weighed licensee's Statement in Mitigation. However, we find such statement devoted principally to arguing that Eugene Slatkin's numerous violations and misrepresentations do not justify a penalty as drastic as revocation of license, while, at the same time, admitting that almost every allegation of such violations and misrepresentations is true. The Commission cannot tolerate extensive and continuing misrepresentations such as occurred here. We expect and are entitled to absolute candor on the part of broadcast licensees. FCC v. WOKO, Inc., 329 U. S. 223; Palmetto Broadcasting Company, 23 RR 483; Eleven Ten Broadcasting Corporation, 22 RR 699. Further, "[to] regard as of no consequence the licensee's repeated and deliberate violations would be to make a travesty of the Commission's function." Neighborly Broadcasting Company, Inc., FCC 63-92 (released February 1, 1963).

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19. Accordingly, and based on the foregoing findings, we conclude that Station WBMT was constructed, and since that time has been operated, without a valid construction permit, license or other valid authorization, in willful violation of Sections 301 and 310(b) of the Communications Act of 1934, as amended; and that Eugene Slatkin, for the reasons set forth in the Order to Show Cause and in part repeated in this Order, lacks the character qualifications to be a broadcast licensee in that he (1) misrepresented his financial qualifications; (2) concealed from the Commission the dissolution of the applicant partnership agreement; (3) misrepresented, in many applications and other documents filed with the Commission, the legal status of the applicant; (4) permitted the construction, operation and control of the station by persons other than the permittee and licensee, and (5) knowingly made false statements to the Commission in his verified statement submitted on February 1, 1962, and in the affidavit he executed on May 5, 1960, in connection with the E. E. Bryant application for a construction permit at Asheville, North Carolina.

Eugene and David P. Slatkin d/b as Mountain View Broadcasting Company, have not shown why an order revoking their license should not be issued and it is concluded that the license of Station WBMT, Black Mountain, North Carolina, should be revoked.

ACCORDINGLY, this 3rd day of July, 1963, upon reconsideration of the Commission's action of June 26, 1963, pursuant to Section 1.16 of the Commission's Rules, IT IS ORDERED, pursuant to Sections 312(a)(1) and (2) and 312(c) of the Communications Act of 1934, as amended, that the license of Eugene and David P. Slatkin d/b as Mountain View Broadcasting Company, for Station WBMT, Black Mountain, North Carolina, IS REVOKED, and the call letters ARE DELETED. 7/

IT IS FURTHER ORDERED, That an order of revocation of the license of Radio Station WBMT is HEREBY ISSUED, and that said order of revocation shall not become effective until September 1, 1963, in order to provide the licensee with an opportunity to wind up its affairs.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: July 8, 1963

7/ Although both Eugene and David P. Slatkin are partners in the licensee of record of WBMT and therefore both are named in this Order, the Commission is aware that David P. Slatkin has had no actual connection with WBMT since March 3, 1960.

[WWIT EXHIBIT 3]

[Caption Omitted in Printing]

COMPLAINT TO BE USED AS AN AFFIDAVIT

Plaintiff, complaining of the defendant, alleges and says:

(1)

That the Plaintiff is a citizen and resident of Buncombe County, North Carolina

(2)

Upon information and belief it is alleged that the defendant is a citizen and resident of Haywood County, North Carolina.

(3)

That on or about the 27th day of July, 1961, the defendant VERNON E. PRESSLEY, caused to be issued a Civil Summons out of the Clerk of Superior Court of Haywood County, North Carolina, which was duly served on the plaintiff on the 31st day of July, 1961, along with an application signed by the defendant herein, which was duly verified and sworn to by said defendant, and also caused to be served on the plaintiff, an order signed by the Clerk of Superior Court of Haywood County, North Carolina, Dixie Campbell, on the 27th day of July, 1961, requiring said plaintiff, EUGENE SLATKIN, to appear before LEE THOMPSON, as commissioner, to hold an adverse examination of this plaintiff at the office of the Clerk of Superior Court of Buncombe County, North Carolina on the 8th day of August, 1961 at 3 o'clock P.M., and there submit himself to an examination in regard to the application filed before the Federal Communications Commission by one B. E. BRYANT for a radio station grant on 920 kilocycles in Asheville, North Carolina

(4)

That also on the 27th day of July, 1961, the Clerk of the Superior Court of Haywood County, North Carolina, signed another Order which was also served along with the other proceedings herein before set forth, allowing the plaintiff, VERNON E. PRESSLEY, in that action, who is the defendant in this action, 20 days from said date of taking the adverse examination of this plaintiff, EUGENE SLATKIN, within which to file a Complaint.

(5)

That said defendant herein, VERNON E. PRESSLEY, on the 15th day of May, 1961, caused a proceeding of the same nature to be issued from the Clerk of the Superior Court of Haywood County, against B. E. BRYANT, for the purpose of taking the adverse examination for the purpose of discovery of evidence of said B. E. BRYANT, in regard to the same matter; said adverse examination of B. E. BRYANT, being held on the 26th day of May, 1961, before LEE THOMPSON, Commissioner, appointed for said purpose.

(6)

That the proceedings of VERNON E. PRESSLEY, Plaintiff versus B. E. BRYANT, the plaintiff in that action, VERNON E. PRESSLEY was given 20 days after the taking of the adverse examination of B. E. BRYANT, to file his Complaint and that the plaintiff did not do so, as by law provided.

(7)

Upon information and belief it is alleged that the defendant in this action, VERNON E. PRESSLEY, in causing the process to be issued on the 27th day of July, 1961, against the plaintiff, EUGENE SLATKIN, and in causing the service of said proceedings on this plaintiff has not acted in good faith and had no merit in filing said proceedings or serving the same on this

plaintiff, or requiring him to answer, or in requiring that his adverse examination be taken for any purpose whatsoever.

(8)

Upon information and belief it is alleged that the defendant herein, VERNON E. PRESSLEY, has not filed his Complaint against the said defendants in his prior action, to-wit, B. E. BRYANT and in doing so has shown that he did not act in good faith in that proceeding as well as in the one herein specifically referred to. That the defendant herein, VERNON E. PRESSLEY, in causing said proceedings to be issued and making the slanderous and libellous allegations toward this plainiff, EUGENE SLATKIN, acted with the malicious and wilful intention in having said proceedings issued and served on these parties, and particularly the plaintiff herein, to subject said EUGENE SLATKIN to fear and in order to coerce him into using pressure to cause one B. E. BRYANT to withdraw his application for a radio station grant on 290 kilocycles which he had applied for before the Federal Communications Comission.

(9)

Upon information and belief it is alleged that this wilful and intentional action on the part of the defendant herein, VERNON E. PRESSLEY, was done specifically for the purpose of putting fear into the minds of all persons who either knew or were directly or indirectly connected with B. E. BRYANT in any manner whatsoever, or who had even had any conversation with him in regard to making an application for a radio station grant before the Federal Communications Commission.

(10)

Upon information and belief it is alleged that the defendant, VERNON E. PRESSLEY, wilfully, intentionally, and maliciously caused said proceedings to be issued on the 27th day of July, 1961 by the Clerk of the Superior Court of Haywood County, North Carolina, which were duly served on the plaintiff herein, EUGENE SLATKIN requiring him by order of the Court to appear for said adverse examination, when said defendant, VERNON E. PRESSLEY, had no basis in law or equity to institute said proceedings or to take said adverse examination of the plaintiff herein.

(11)

Upon information and belief it is alleged that if the defendant herein, VERNON E. PRESSLEY, who is the plaintiff in said action pending in Haywood County is allowed to take said adverse examination the plaintiff herein; then said plaintiff will be unjustly, inequitably and surreptitiously damaged; and that irreparable harm and damage will be caused to the plaintiff in that in view of the matters and things herein alleged he is without an adequate remedy at law for relief against the defendant herein, VERNON E. PRESSLEY; and that in action for damages against said defendant would not adequately protect the plaintiff in his property interest or character and would not prevent the defendant, VERNON E. PRESSLEY, from continuing his wilful, malicious and intentional conduct of making said slanderous and libellous statements orally and by means of the courts of this state and other states against this defendant, and thereby seriously damaging his character, credit, prestige in the profession which he is now and has been engaged most of his life and that by such procedure which has not been

attempted or carried out in good faith in any matter whatsoever by the defendant herein the plaintiff herein would be irreparably damaged.

WHEREFORE, plaintiff prays the Court as follows:

1. That the defendant, VERNON E. PRESSLEY, his agents, servants, and employees, be immediately restrained and enjoined from taking said adverse examination that was originally set for the 8th day of August, 1961 at 3 o'clock P.M., before LEE THOMPSON, Commissioner appointed for that purpose, or that said defendant, his agents, servants, and employees, be immediately restrained and enjoined from taking said adverse examination on the 15th day of August 1961 at 3 O'clock P.M., in the office of the Clerk of Superior Court of Buncombe County, North Carolina as was continued by the parties herein and their attorneys of record.
2. That the costs of this action be taxed by the Clerk.
3. For such other and further relief as to the Court may seem just and proper.

GILBERT, WILLSON AND RIDDLE,
Attorneys

By /s/ Robert B. Willson

[WWIT EXHIBIT 10]



WESTERN NORTH CAROLINA
Broadcasters, Inc.
 CANTON, NORTH CAROLINA

1000 WATTS
Serving
 O CANTON
 O WAYNESVILLE
 O ASHEVILLE

November 12, 1962

Mr. Ben F. Waple, Acting Secretary
 Federal Communications Commission
 Washington 25, D. C.

Dear Mr. Waple:

We enclose herewith a copy of an agreement entered into late in December 1958 by Western North Carolina Broadcasters, Inc., and B. M. Middleton and Kermit Edney, also a copy of an agreement executed in May 1960 by the same parties in compromise of the preceding arrangement. This agreement provides for the payment of certain sums to Messrs. Middleton and Edney for a period of five years beginning January 1, 1959, for services to be rendered to the corporation in a consulting capacity to the extent that they may be called upon.

The agreement was not entered into at the time of the transfer of control agreement whereby Messrs. Middleton and Edney sold their stock in this corporation. It was apparently for that reason that it was not filed with that application, BTC-2951, which was granted in November 1958.

However, as the undersigned testified in the proceeding upon the Pressley application, Docket No. 14,007, the consulting agreement was contemplated when the stock purchase agreement was executed, and so should probably have been considered a part of the purchase price. In fact, our Washington counsel advises that its terms, if known, should have been reduced to writing and submitted as an exhibit with the application. The enclosed documents were furnished and were made part of the record as F. C. C. Exhibits 4 and 6, respectively.

In the Initial Decision of Examiner Donahue released on October 9th he made particular mention of the fact that these documents had never been filed. Inasmuch as he apparently believes that they should now be on file even though they had not been submitted with the transfer application, and even though they were actually a part of the Commission's records in the Pressley proceeding, the enclosed are submitted to be associated with the transfer application or to be handled in such manner as the Commission may consider appropriate.

There is certainly nothing secret about these documents, as was indicated by the readiness of the undersigned to discuss them and to make them available. We did not consider the consulting arrangement to be a management consulting agreement within the contemplation of Rule 1.342 (f) (1) because it was not contemplated that any consultation would relate to the actual

THIS IS CHAMPION PAPER



MANUFACTURED IN CANTON

Radio Active
WWIT

WESTERN NORTH CAROLINA
Broadcasters, INC.
 CANTON, NORTH CAROLINA

1000 WATTS
Serving
 O CANTON
 O WAYNESVILLE
 O ASHEVILLE

- 2 -

management of the station, but primarily to programming and to promotional ideas and then only when requested. Certainly the arrangement did not provide that Messrs. Middleton and Eoney would participate in the profits or share in the losses of Station WWIT.

We regret if we have been in error in our interpretation of our obligation under your Rules.

Very truly yours,

WESTERN NORTH CAROLINA BROADCASTERS, INC.

By _____
 President

THIS IS CHAMPION PAPER



MANUFACTURED IN CANTON

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,657

VERNON E. PRESSLEY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WESTERN NORTH CAROLINA BROADCASTERS, INC.,
Intervenor.

On Appeal from a Decision of the
Federal Communications Commission

BRIEF FOR INTERVENOR

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 13 1970

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WESTERN NORTH CAROLINA BROADCASTERS, INC.,
Intervenor.

On Appeal from a Decision of the
Federal Communications Commission

BRIEF FOR INTERVENOR

STATEMENT OF THE ISSUES

The Intervenor agrees with the Statement of the Issues set forth on page
(iv) of Appellant's Brief.

This case has not previously been before the Court.

STATEMENT OF THE CASE

The Intervenor respectfully submits that the Statement of the Case presented by the Appellant is somewhat selective; further, the Intervenor submits that Appellant's presentation does not properly focus upon all of the procedural developments in this unusual case. Accordingly, the Intervenor believes that a counter-statement of the case will be helpful to the Court in its consideration of this appeal.

The Appellant here, Vernon E. Pressley, is licensee of Radio Station WPTL, Canton, North Carolina. Canton is also the location of Station WWIT, which is licensed to the Intervenor, Western North Carolina Broadcasters, Inc. The Appellant seeks review of a decision of the Commission (J.A. 57-64)¹ which granted the application of Intervenor for renewal of license of WWIT. Intervenor's application for renewal of license was granted only after the holding of extensive evidentiary hearing and oral argument before the Commission. To properly understand the proceedings under review in this appeal, some discussion of earlier proceedings is appropriate.

THE PRESSLEY HEARING

The Commission designated the Intervenor's application for renewal of its license for evidentiary hearing as a result of questions raised during an earlier hearing involving the application of Appellant for construction permit to establish Radio Station WPTL. That case, *Vernon E. Pressley*, 33 FCC 838 (1962), was an Initial Decision issued by a Hearing Examiner and was not reviewed by the Commission. The Initial Decision in *Pressley* became final because no party to that proceeding took any exceptions to any of the findings or conclusions reached by the Hearing Examiner. As such, the *Pressley* decision

¹ J.A. 57-64, and similar citations, *infra*, refer to appropriate pages of the Joint Appendix.

is not a Commission decision.² In the hearing proceedings under review here, neither the Hearing Examiner nor the Commission considered findings or conclusions in the *Pressley* case to be *res judicata* as to either the Intervenor or any of its principals.³ All the same, matters which arose at the *Pressley* hearing proceedings are worthy of mention since they helped to establish the background of this proceeding.

At the time Intervenor's application for renewal of license for WWIT was filed with the Commission, there were pending before the Commission two applications for new station to operate daytime only on the frequency of 920 kilocycles. One application was filed by Vernon E. Pressley for a second station at Canton, North Carolina.⁴ Another applicant was Billy E. Bryant who proposed to construct a fifth station at Asheville, North Carolina, some 18 miles east of Canton.⁵ The population of Asheville, according to the U.S. Census, was 60,192, or more than 10 times that of Canton. The Pressley and Bryant applications were mutually exclusive in that they could not operate simultaneously without destructive interference; accordingly, under Commission procedures, it was necessary to hold a hearing to determine which, if either, of the applications could be granted. The Pressley and Bryant applications were thus mutually exclusive with each other but not with the application of WWIT for renewal of its license.

Prior to the start of the evidentiary hearing required on the Pressley and Bryant applications, Pressley charged that Bryant's application had not been filed in good faith, but for the purpose of delaying and preventing the establishment of a second station at Canton which would compete with WWIT. In

² FCC Public Notice 61-25, 20 P & F Radio Reg. 1141 (1961).

³ Initial Decision, *Western North Carolina Broadcasters, Inc.*, 20 FCC 2d 103, 13 P & F Radio Reg. 2d 183, n. 1 (1968).

⁴ File No. BP-12872.

⁵ File No. BP-14104.

support of his claim, Pressley charged Western North Carolina and its General Manager, Dalton R. Paxton, with providing improper assistance to Bryant.

The Broadcast Bureau of the Commission raised a substantial question about the validity of Bryant's engineering proposal in that the Bureau alleged that Bryant would not be able to maintain the stability of his directional antenna array. Before the actual hearing began, Bryant dismissed his application. He cited the expense of hearing and expenses of \$20,000 to \$30,000 to regrade the antenna site which he had selected.

A hearing was held in December, 1961 and January, 1962, on Pressley's application and on an application to increase the power of co-channel Station WTCW, Whiteburg, Kentucky.⁶

One of the issues in the Pressley hearing was whether Pressley had submitted false affidavits in support of his charges against Bryant. Two of Intervenor's principals, Paxton and Sidney A. Watts, were subpoenaed by and testified as witnesses for the Commission's Broadcast Bureau. Although the issue against Pressley had been added at Bryant's request, Bryant was not called as a witness.

Neither Intervenor nor its principals, Paxton or Watts, were parties to the Pressley hearing. The Rules of the Federal Communications Commission in effect at the time made no provision for representation of counsel for witnesses who were not parties to hearing proceedings. No counsel entered an appearance for Paxton or Watts, and there was no one to object to questions to them or to develop clarifying testimony from them. When Paxton tried to explain some of his testimony, he was not permitted to do so by the Hearing Examiner.

⁶ File No. BP-13526.

The Initial Decision of the Hearing Examiner in the *Pressley* case⁷ released October 9, 1962, proposed to grant both the Pressley and WTCW applications. That decision contained findings of fact which reflected adversely upon Paxton and Watts. Because neither Intervenor, nor Paxton or Watts were parties to the Pressley proceeding, they could not file exceptions and the Initial Decision became final automatically on November 28, 1962.⁸

In the meantime, Intervenor's application for renewal of license of WWIT was still pending at the Commission.

PROCEEDINGS UNDER REVIEW

Hearing Designation

On July 7, 1965, or almost five years from the date Intervenor filed his application for renewal of license of Station WWIT, the Appellant filed a Petition To Deny the WWIT renewal application.⁹

Therein, the Appellant cited, as a basis for denying Intervenor's renewal application, the Initial Decision which had been issued almost three years before. Appellant's Petition To Deny relied solely on matters which had been explored at the 1961 and 1962 hearings in the *Pressley* case.

By *Memorandum Opinion and Order* (FCC 66-1147, released January 4, 1967), the Commission designated Intervenor's application for renewal of license of Station WWIT for evidentiary hearing.¹⁰ The *Memorandum Opinion*

⁷ The Hearing Examiner in the *Pressley* case was not the same Hearing Examiner who presided at the hearing proceeding held on Intervenor's application for renewal of license of WWIT.

⁸ See *Vernon E. Pressley*, 33 FCC 838 (1962).

⁹ Under present Commission standards, such a petition would be more than 56 months late. See Sections 1.580(i) and 1.516(e) of the Commission Rules and Regulations.

¹⁰ The Order of hearing designation was released more than six years and four months from the date on which the Intervenor tendered with the Commission its application for renewal of license of Station WWIT.

and Order of the Commission was confined to matters of record in the earlier *Pressley* proceeding and the decision released therein. The Commission specified a number of issues in its designation Order, and, as will be shown, made findings favorable to Intervenor and/or its principals on each issue designated.

The Hearing Proceedings

In hearings held before an Examiner, Messrs. Paxton and Watts again testified with respect to the matters which had arisen in the earlier *Pressley* hearing (J.A. 165-189, 206-212, 235-239, 153-164). The Examiner held (J.A. 4-7), in addition, that the testimony of Paxton was corroborative of that of Bryant, who also testified (J.A. 75-84) in this proceeding.¹¹ It must be remembered that inasmuch as Bryant did not testify in the earlier *Pressley* hearing, this was the first occasion on which there had been an opportunity to examine representations made by Bryant under oath. The Examiner also found¹² that no useful purpose would be served by detailed analysis of the record or composition of precise findings of fact with relation to purported conflict in testimony between Vernon E. Pressley, the Appellant, and his brother, Joe Pressley, on the one hand, and principals of Intervenor, Western North Carolina (Paxton and Watts) on the other. The Examiner specifically held that it was not material to the disposition of the designated issues to resolve these conflicts or to make findings of fact regarding these meetings (J.A. 13).

Another witness, and one who appeared on behalf of Appellant, was Eugene Slatkin (J.A. 85-124). After detailing the testimony of Slatkin, the Examiner concluded (J.A. 9-11) that he was an out-and-out liar.¹³ Slatkin had executed contradictory affidavits (J.A. 250-258). There were indications that

¹¹ Initial Decision, *Western North Carolina Broadcasters, Inc.*, 20 FCC 2d 103, 13 P & F Radio Reg. 2d 183, at paras. 14-28 (1968).

¹² *Id.*, at para. 48.

¹³ *Id.*, at paras. 36-40.

he was willing to sell his testimony to the highest bidder. The Examiner also observed that in a Memorandum Opinion and Order, released July 8, 1963, the Commission had revoked Slatkin's license for Station WBMT, Black Mountain, North Carolina, primarily for a series of misrepresentations and false statements to the Commission (J.A. 10, 263-271).¹⁴

A. Hal Edwards also testified as a witness for the Appellant. The record in the Pressley case reflects that Edwards was twice convicted of forging and uttering in North Carolina. The Hearing Examiner properly discredited the testimony of Edwards. The Examiner concluded (J.A. 8-9, 10-11) that Edwards was not a reliable witness and that no portion of the Initial Decision would rest upon the statements of Edwards.¹⁵

Also appearing as witnesses in the WWIT renewal application hearing proceeding were Nugent Sharpe, a consulting engineer (J.A. 189-206); Fred Sigman, an attorney practicing law in Asheville, North Carolina; and Scott P. Crampton, an attorney who specializes in the practice of tax law in Washington, D.C.

The Commission had specified six issues in its designation Order:

(1) Whether Intervenor or its principals promoted, supported or otherwise participated in preparation and filing of Bryant's application for the purpose of impeding grant of the application of Pressley;

(2) To determine whether Paxton, Watts or other principals of Intervenor made misrepresentations to the Commission or concealed facts from the Commission concerning the total consideration between the parties to the application wherein Paxton, Watts, and others acquired a majority stock interest in Station WWIT;

¹⁴ See *In re Mountain View Broadcasting Co.*, 25 P & F Radio Reg. 771 (1963).

¹⁵ Initial Decision, *Western North Carolina Broadcasters, Inc.*, 20 FCC 2d 103, 13 P & F Radio Reg. 2d 183, at paras. 29-35, 40, 41 (1968).

(3) To determine whether the principals of Intervenor failed to file prior to November 12, 1962, a consulting agreement entered into December of 1958;

(4) To determine whether Paxton or any other principal of Intervenor made misrepresentation to the Commission or concealed facts from the Commission in the *Pressley* hearing;

(5) To determine whether, in light of the evidence adduced under the foregoing issues, Intervenor possessed the requisite character qualifications to be a Commission licensee; and

(6) To determine whether, in light of the evidence adduced under the foregoing issues, the application for renewal of license of WWIT should be granted.

The Examiner concluded (J.A. 15) that it was unnecessary to make any findings or conclusions on Issue (4).¹⁶ The Examiner recommended, however, that the application for renewal of license of WWIT should not be renewed.

THE COMMISSION DECISION

Intervenor and the Commission's Broadcast Bureau¹⁷ filed Exceptions to the Initial Decision and Briefs In Support of their Exceptions (J.A. 29-57, 17-29). Appellant took no exceptions to the Initial Decision; Appellant did file a Reply Brief to the brief of the Broadcast Bureau in support of the Bureau's Exceptions to the Initial Decision. The Commission set aside one and one-half hours for oral argument, which was held on June 30, 1969. On October 20, 1969, the Commission issued the Decision which is under appeal herein

¹⁶ *Id.* at para. 59.

¹⁷ The Bureau actively participated in the hearing proceedings before the Hearing Examiner and recommended, in a 59-page pleading entitled "Broadcast Bureau's Proposed Findings Of Fact And Conclusions Of Law," dated March 4, 1968, that the application for renewal of license of WWIT be granted.

(J.A. 57-64). That Decision granted ten Exceptions taken by the Broadcast Bureau to the Initial Decision and granted 33 Exceptions taken by the Intervenor to the Initial Decision. The Bureau's Exceptions had taken the position that the Examiner's Conclusions adverse to Intervenor and/or its principals were either (1) not supported by the record or (2) supported only by testimony of Edwards which the Examiner had already categorically rejected. The Intervenor's Exceptions and Supporting Brief made similar presentations, and argued, in addition, that the proceedings up to that point had denied Intervenor of administrative due process. The Commission, having heard oral argument and reviewed the Exceptions and Supporting Briefs of the Broadcast Bureau and Intervenor, made the following Findings of Fact (J.A. 59-62):

"The Alleged 'Strike' Application

"6. It seems clear that WWIT did not relish the prospect of competition from another station in Canton. Thus, Sidney Watts, a WWIT principal, attempted to purchase an outstanding note of Vernon Pressley with the thought that he might impair Pressley's financial qualifications before the Commission. Paxton testified that an interference study of Pressley's application showed interference to Station WTCW in Whitesburg, Kentucky; that he, Paxton, mentioned to an individual at WTCW the potential interference problem between that station and Pressley's proposal; and that Paxton told that individual that he would be glad to furnish any information which he could regarding Section 307(b). Paxton and Watts also discussed interference and Pressley's financial statement with the manager of another station.

"7. Paxton accompanied Bryant to Washington, D.C. on two occasions when Bryant was engaged in activities preparatory to filing his application. However, Bryant paid for the transportation in connection with the two trips.

"8. While Paxton gave Bryant a \$500 check on April 27, 1960, this was in payment for a mineral interest which he had purchased from Bryant, who was at the time a promoter of mineral interests. \$500 was the amount of the retainer fee required by Bryant's radio engineer, Nugent Sharpe, but there is no indication that the mineral interest transaction took place to enable Bryant to pay the retainer. Furthermore, Nugent Sharpe ascertained, when Paxton and Bryant first called on him in Washington, that Paxton had no financial interest in the application and that Bryant intended in good faith to be the station owner. Thus, we do not agree with the Examiner's findings that Paxton provided the cash for Bryant to meet his initial expenses as an applicant.

"9. Eugene Slatkin, an employee of WWIT, worked on Bryant's application on April 27, 1960, two days before it was filed. However, this work was done by Slatkin at the specific request of Bryant, a prior acquaintance. Apparently Paxton's only part in this was his permitting Slatkin to trade time with another employee of Station WWIT in order for Slatkin to be free on April 27. No employee of WWIT other than Slatkin worked on the Bryant application. Slatkin received a \$50 check, dated April 30, 1960, from WWIT. There is evidence, however, that this was in payment for his work in connection with a new program format called 'Tempo', which WWIT introduced to enhance its competitive position with regard to the new station which was expected in Canton, and that he was paid extra for this because he was working only temporarily at WWIT and at a low salary. On the basis of this record, we are not persuaded that Paxton instigated Bryant's license application.⁷ Rather, we find that Bryant, after he had decided to apply for the radio license, received a modicum of assistance from Paxton, a prior acquaintance.

⁷ There is no support for the finding that Paxton recruited Bryant as an applicant by means of one A. Hal Edwards. In his testimony, Edwards suggested that this was the case, but the Examiner determined that Edwards was not a reliable witness, and we agree with this conclusion.

"10. In light of the evidence in this unusual case, we are not prepared to deny renewal of WWIT's license. Bryant appears to have been seriously interested in obtaining a license at Asheville, but he dismissed his application after the Broadcast Bureau raised a substantial question about the validity of his engineering proposal. Finally, we believe that Paxton's action, recognizing the potential advantage to WWIT of Bryant's application, is quite different from the act of instigating an application to compete with Pressley's application.

"The Consulting Agreement

"11. An application was filed on October 31, 1958, for transfer of control of WWIT from Beverly M. Middleton, Kermit Edney, and others to Dalton R. Paxton, Sidney A. Watts, W. Barry Medlin, Jr., and others. The consideration was listed as \$20,000 to be paid when the sale was consummated and an additional \$20,000 plus interest in monthly installments over five years. We granted the application on November 28, 1958. On December 22, 1958, the transfer of stock in WWIT was consummated, and a consulting contract was executed which provided: (1) that the corporation would employ Middleton and Edney to serve 'in a consulting capacity to the extent that may be called on'; (2) that the emolument of \$1200 per month was to be paid for five years to them collectively, and in the event of the demise of either, to the survivor of them, and if both died, to the President of Radio Hendersonville, Inc.; and (3) that, if more than two consecutive payments should become in default, the entire balance would become due and payable. By a revision on May 31, 1960, the amount payable under the consulting agreement was reduced. Neither the consulting agreement nor its revision was filed with the Commission at the time of its execution, but a copy of the agreement was introduced in evidence on January 16, 1962, at the hearing in *Vernon E. Pressley, et al., supra*.

"12. There was testimony in this proceeding that the consulting agreement was part of the purchase price and

also that the transferees needed the advice of Middleton and Edney. Watts and Paxton did not discuss the consulting agreement prior to the purchase of the stock. Watts thought that the consulting agreement was probably a common procedure and that it was a 'good deal' because it would give the purchasers the benefit of some firsthand experience in running a radio station. Watts was not aware of any tax advantages. Paxton's understanding was that he was obligated only under the stock purchase agreement and that additional payments were the obligation of the corporation.⁸ In the application for transfer of control the parties mentioned, and submitted as an exhibit, the stock transfer agreement, but no mention was made of the consulting agreement. The application for transfer of control was signed on behalf of the transferers by Beverly M. Middleton and on behalf of the transferees by W. Barry Medlin, Jr., who is no longer a WWIT stockholder. On the basis of a letter which purports to have been signed in his behalf on October 7, 1958, we believe that the deceased attorney, Mr. Eliot Lovett, knew, when he submitted the application for transfer of control to the Commission, that a consulting agreement was contemplated.

"13. WWIT, by letter of November 12, 1962,⁹ transmitted the consulting agreement as amended to the Commission for filing, although it had previously been received in evidence in *Vernon E. Pressley, et al., supra*. The letter of transmittal, *inter alia*, stated: (1) that the consulting agreement was not entered into 'at the time of the transfer of control agreement whereby Messrs. Middleton and Edney sold their stock in this corporation',

⁸ The consulting agreement gave the sellers the option of proceeding against the corporation rather than the individual purchasers in the event of non-payment. This would be a potential advantage in case of default.

⁹ Counsel stipulated that this letter was drafted by Mr. Eliot Lovett and signed by Mr. Watts. The letter was admitted, not to establish the truth of the assertions contained therein, but simply to establish that it was filed.

(2) that apparently for this reason it was not filed with the application; (3) that the consulting agreement was contemplated when the stock purchase agreement was executed and so should probably have been considered part of the purchase price; and (4) that the parties did not consider the consulting arrangement to be a *management* consulting agreement within the provisions of Rule 1.342 (f)(1) because it was not contemplated that any consultation would relate to the actual management of the station, but primarily to programming and to promotional ideas.

"14. The consulting agreement was part of the purchase price. There is no satisfactory explanation as to why the consulting agreement was not filed with the transfer application. The consulting agreement had no bearing upon the transferees' financial qualifications because payments under the agreement were the obligation of the corporation and were not guaranteed by any of the individual transferees. While the Examiner found that the non-disclosure of the consulting agreement was motivated by a desire to obtain a tax advantage for WWIT, he did not make findings on the following significant testimony. Attorney Scott P. Crampton, a tax specialist, testified at the hearing, that there was an adequate disclosure of the consulting fees to the Internal Revenue Service and that he saw no motive from a tax standpoint for non-disclosure of the consulting agreement to the Federal Communications Commission. We thus conclude that WWIT had nothing to hide from the Commission; that it was not guilty of any misrepresentation; and that failure to file the agreement does not reflect adversely on the applicant's character qualifications.¹⁰ Accordingly, we are convinced that the Examiner's Initial Decision should be reversed and that WWIT's license should be renewed.

¹⁰ In view of all of the foregoing, we are also persuaded that no showing has been made that Paxton or any other principal of WWIT made misrepresentations or concealed facts in the *Vernon E. Pressley, et al., Proceeding.*"

ARGUMENT

II. THE COMMISSION'S DECISION SHOULD BE AFFIRMED
AS HAVING SUBSTANTIAL SUPPORT IN THE RECORD.

The role of the Commission in review of Initial Decisions was described by this Court in the case of *Lorain Journal Co. v. Federal Communications Commission*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965). In that case, the Court stated as follows:

" . . . we are fully appreciative of the importance of the contribution of the Hearing Examiner to the maintenance of the Rule of Law in the decisions of administrative agencies. But their authority to render Initial Decisions does not mean that the various Boards and Commissions are relegated to the role of reviewing courts whose sustained findings of fact of first instance unless clearly erroneous. *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 364 (1955). The responsibility for decision is placed in the Commissioners appointed by the President and confirmed by the Senate to discharge the function of administering the statutes under the agencies' cognizance.

"The agency heads must take the decision of the Examiner into account. Indeed, we have only recently remanded a Board's decision which changed the decision rendered by the Examiner without adequate showing of the basis on which it rejected the Examiner's conclusion. *Retail Store Employees v. NLRB*, No. 19051, decided July 13, 1965. But the foregoing recital clearly shows that in this case, the Commission did study and address itself to the salient conclusions and reasoning of the Examiner. Thereafter, it is for the agency to draw its own inferences and to reach its own conclusions for implementing the statutory mandate. The agency's conclusions must be sustained if supported by substantial evidence even though there is also substantial evidence to support the contrary conclusion of the Examiner. The Examiner's report is entitled to 'such probative force as it intrinsically commands'. (See 340 U.S. at 495). In this case, even

assuming that the Examiner's report reflects a plausible view of the evidence, it does not negative the Commission's conclusions as a permissible view of the significance of facts shown by the evidence. There are indeed items of evidence supporting the Examiner's conclusion. There are also countervailing factors. It is for the Commission to measure the force of the various vectors and to chart the resultant in the parallelogram of forces." 122 U.S. App. D.C. 127, 131; 351 F.2d 824, 828 (1965).

Title 5, Section 557(b) of the United States Code Annotated provides, in pertinent part, as follows:

" . . . when the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule . . . "

The brief of the Appellant would ignore the statutory obligations of administrative agencies in exercising their review over initial decisions of Hearing Examiner in adjudicatory proceedings. The Appellants, in effect, are suggesting that the Commission should abdicate its statutory obligations and adopt, without more, the decisions of its Hearing Examiners. Appellant's position is sustained by neither statute, as already noted, nor by court decisions which have discussed the function of administrative agencies in reviewing recommended decisions of Hearing Examiners. Some brief discussion of some of these cases will illustrate this point.

The case of *Florida Gulf Coast Broadcasters, Inc., v. Federal Communications Commission*, 122 U.S. App. D.C. 250, 352 F.2d 726 (1965) is pertinent here. In that case, this Court was asked to require the Commission to reconsider a grant of a television construction permit. The Court held that the Commission was acting entirely within the field of its competence, that the

Commission's Findings were supported by substantial evidence, were not arbitrary or capricious, and were, therefore, conclusive.

The case of *U.S.A.C. Transport, Inc., v. United States*, 235 F. Supp. 689 (D.C., Del.); affirmed, 380 U.S. 450 (1964), involves review of Orders of the Interstate Commerce Commission which interpreted the scope of operating authority held by the plaintiff. It had been argued that the Interstate Commerce Commission, in not accepting portions of the Hearing Examiner's recommendations, erred in construing its authority to reject Examiner's recommendations. The Court noted the well-established doctrine that the Interstate Commerce Commission is not required to accept Examiner's recommendations.

In the case of *Braswell Motor Freight Lines, Inc. v. United States*, 275 F. Supp. 98 (D.C., W.D., Texas, 1967); affirmed, 390 U.S. 975 (1968), the United States District Court for the Western District of Texas was reviewing an action to set aside, in part, a Report and Order of the Interstate Commerce Commission. The District Court upheld the decision of the Interstate Commerce Commission because it was supported by substantial evidence. In so doing, the Court noted as follows:

"Plaintiff attaches great importance to the manner in which the Commission reversed the Trial Examiner. In the final analysis, it is the obligation and duty of the Commission to make its decision, and in so doing, it is free to accept or reject the recommendations of its Examiners." 275 F. Supp. 98, 103.

See also *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1950); *Morgan Drive-Away, Inc., v. United States*, 268 F. Supp. 886, 887 (D.C., N.D., Inc., 1967); and *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 358, 364 (1955).

The Appellant's principal claim appears to be that the Decision of the Federal Communications Commission did not adopt the course recommended by the Hearing Examiner. Such a contention ignores basic Hornbook Law.

In his *Administrative Law Text*,¹⁸ the noted authority on administrative law, Professor Kenneth Culp Davis has stated as follows:

"The final distillation from the case law is that the primary fact finder is the agency, not the Examiner; that the agency retains 'the power of ruling on facts . . . in the first instance'; that the agency still has 'all the powers which it would have in making the initial decision'; that the Examiner is a subordinate whose findings do not have the weight of the findings of a District Judge; that the relation between Examiner and agency is not the same or even closely similar to the relation between agency and the reviewing court . . ."

A logical extension of the Appellant's position would deprive parties to administrative agency proceedings of their rights under Title 5, Section 557(c) of the United States Code, Annotated. That provision of the Administrative Procedure Act specifically provides that parties are entitled to a reasonable opportunity to submit exceptions to recommended decisions and supporting reasons for the exceptions. The administrative agency is required to show on the record the ruling on each exception presented. As previously indicated, the Commission, as a part of its review of the Initial Decision in these proceedings, also reviewed and granted ten Exceptions of the Broadcast Bureau and 33 of the Intervenor. In so doing, the Commission was implementing the statutory mandate of the Administrative Procedure Act. The agency is to be commended rather than faulted in carrying out its statutory responsibilities in such a meticulous manner.

In light of the foregoing, it is obvious that Appellant misconstrues the relief available from this Court. The issue here is whether what the Commission did, in light of the reasons it gave, was unreasonable and capricious. The Commission has exercised its statutory responsibilities. There is substantial

¹⁸ K. Davis, *Administrative Law Text*, §10.04 (Hornbook ed. 1959).

evidence in support of the Commission's Findings and Conclusions. There has been no abuse of administrative discretion. Accordingly, this decision should be sustained upon appeal. See *Kessler v. Federal Communications Commission*, 117 U.S. App. D.C. 130, 326 F.2d 673 (1963); *Moon v. Celebrezze*, 340 F.2d 926, 930 (1965). *Kidd v. Federal Communications Commission*, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962); *Wyszatycki v. Federal Communications Commission*, 105 U.S. App. D.C. 399, 267 F.2d 676 (1959); *Massachusetts Bay Telecasters, Inc., v. Federal Communications Commission*, 104 U.S. App. D.C. 226, 261 F.2d 55 (1958).

II. NO USEFUL PURPOSE WOULD BE SERVED IN REMANDING THIS CASE.

The Intervenor's application for renewal of its license has been pending before the Commission since 1960. As has been already stated, the decision of the Commission has been supported by substantial evidence, reflects a proper exercise of administrative agency discretion, and should be affirmed. However, in light of the Appellant's contentions, it is appropriate to consider the implications of remand to the administrative agency for further proceedings since this is the relief requested by Appellant.

Certainly, since the events at issue occurred in 1958, 1959, and 1960, the problems of trying to elicit further meaningful testimony cannot be ignored. It is unlikely that the testimony of any of the witnesses would be substantially changed, other than testimony of Slatkin and Edwards, both of whom have been discredited by the Examiner and the Commission. Unlike the *Pressley* case, where Bryant did not testify, there was a more complete record developed in the hearing proceedings under review.

Moreover, in the event of remand to the administrative agency, this Court might very well be required to deal with questions of substance raised

before the Commission by the Intervenor which were not reached by the Commission in light of its ultimate decision.¹⁹

The first of the substantive errors raised by the Intervenor before the Commission related to the fact that Intervenor's application was pending before the Commission for more than six years before the Commission issued its Memorandum Opinion and Order designating Intervenor's application for hearing. During all this time, the Intervenor was not apprised of the issues on which Intervenor would have had to make a burden of proof. The issues designated for evidentiary hearing stemmed from allegations of abuse of Commission process and misrepresentations to the Commission. Accordingly, because of the nature of the allegations which were at issue, it is appropriate to draw analogy to precedent involving the criminal process.

It has been held that due process may be denied where a formal charge is delayed for an unreasonable and oppressive time after the offense to the prejudice of the accused.²⁰ This Court has held that due process is violated where there is unnecessary and unexplained delay in the bringing of charges against an accused under circumstances which will prejudice his ability to prepare a defense.²¹

It is recognized that the Federal Communications Commission is not strictly a court. Yet, it must also be recognized that, if anything, the trend of the Commission process is moving closer to the procedures adopted by the

¹⁹ These Exceptions were among nine Exceptions of the Intervenor which were denied by the Commission as lacking decisional significance in view of the decision reached by the Commission (J.A. 63-64).

²⁰ See *Nickens v. United States*, 116 U.S. App. D.C. 338, 340 n. 2, 323 F.2d 808, 810 n. 2 (1963).

²¹ See *Ross v. United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965); *Woody v. United States*, 125 U.S. App. D.C. 192, 370 F.2d 214 (1966). In the *Ross* case, the delay in apprising the accused of charges was seven months from the time of the alleged offense. In the *Woody* case, the delay period was only four months.

courts, as illustrated by Commission promulgation of discovery procedures used under the Federal Rules of Civil Procedure.²²

The Commission's Memorandum Opinion and Order which designated Intervenor's renewal application for hearing stated on its face that the sole basis for hearing designation was a Petition To Deny filed by Appellant more than five years after Intervenor's application had been tendered with the Commission. This delay, *per se*, substantially increased the risk that it would be difficult for the Intervenor to meet its burden of proof with respect to serious charges affecting character qualifications.²³ It is well established in criminal proceedings that an accused can be denied due process through unexplained delay in the bringing of charges which prejudice his ability to prepare a defense thereto. It must be remembered that in the criminal process, the accused need only show that there is reasonable doubt that he committed the offense alleged. In this proceeding, the Commission decreed that the Intervenor was required to bear the burden of proof in refuting charges affecting character. *A fortiori*, the prejudice to the accused due to the delay in bringing charges against him is even greater than that which affected those charged with criminal violations. Indeed, it is remarkable that the Intervenor was able to make a substantial showing in light of the delay between the filing of his application and the determination of the Commission that Intervenor's application should be designated for evidentiary hearing.

Moreover, in the event that this case were to be remanded to the Commission, it is respectfully submitted that the unexplained delay of the Commission in issuing its Order of Designation would assume pivotal importance in respect to the issues which look towards elicitation of all the circumstances surrounding negotiations which led to the filing of the application of transfer

²² See Sections 1.311, 1.313, 1.315, 1.316, 1.318, 1.319, 1.321, 1.323 of the Commission Rules.

²³ See *Carmady v. United States*, 122 U.S. App. D.C. 120, 121, 351 F.2d 817, 818 (1965).

of control of WWIT which was approved by the Commission on November 28, 1958,²⁴ and a consulting agreement entered into in December 1958 between principals of the Intervenor and former stockholders of WWIT (J.A. 259-262). There is no evidence in this proceeding which establishes directly why the Commission was not earlier advised of the existence of the consulting agreement. The man who knew the most about these vital facts was the late Eliot C. Lovett, the Washington attorney for Intervenor, who had passed away in 1963.

Under the provisions of Section 154(j) of the Communications Act of 1934, as amended, the Commission is empowered to conduct proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.²⁵ The requirements of fair administrative hearing include notice of claims and an opportunity to meet them.²⁶ By unexplained delay in issuing its designation Order, the Commission limited the ability of the Intervenor to meet its burden of proof.

The second substantive claim of error made by the Intervenor before the Commission was that the procedures followed in the *Pressley* hearing constituted denial of due process. In those proceedings of 1961 and 1962, the Appellant had to show that he acted reasonably in submitting affidavits which represented to the Commission that the Bryant proposal was instigated by the Intervenor or its principals to prevent competition to WWIT. Accordingly, it was proper to admit into evidence testimony about these representations. However, it must be emphasized that substantial amounts of testimony proffered in the *Pressley* case were not admitted for the purpose of showing the truth or falsity

²⁴ See File No. BTC-3951.

²⁵ *Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265, 95 L.Ed 1353, 69 S. Ct. 1097 (1949).

²⁶ *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 1 L.Ed 2d 438, 77 S. Ct. 502 (1957).

of representations. The result was that an enormous amount of hearsay testimony was admitted into evidence in the *Pressley* proceeding.²⁷

Messrs. Paxton and Watts, principals of the Intervenor, were subpoenaed by the Broadcast Bureau and testified in the *Pressley* case. Neither Paxton, nor Watts, nor Intervenor were parties to the *Pressley* proceeding. No rule or statute in effect at that time provided for representation of legal counsel in Commission proceedings involving witnesses who were not parties to a case.²⁸ Messrs. Paxton and Watts were subjected to intensive questioning by attorneys for the Appellant, the Broadcast Bureau, and by the Hearing Examiner in the *Pressley* proceeding in 1961 and 1962. Paxton tried to explain his testimony but was not afforded an opportunity to clarify his statements.

Procedures by which facts are determined can assume an importance fully as great as the validity of the substantive law to be applied. The more important the rights at stake, the more important must be the procedural safeguards surrounding those rights.²⁹ Had Paxton and Watts been represented by counsel in the *Pressley* hearing, there would have been opportunity to vigorously protect their rights in the adversary process. This right, was not, however, afforded to them in the *Pressley* case. The result was impugning of their integrity based upon inferences, which were, in turn, based upon inferences. This is not conducive to effective administrative process.³⁰ It is respectfully

²⁷ It is also important to point out that Messrs. Slatkin and Edwards, who testified in the *Pressley* proceeding, were found to be utterly unreliable witnesses. This point was not lost upon the Commission in its review of the proceedings involving Intervenor's renewal application (J.A. 57-62).

²⁸ There is now such a rule. See Section 1.27 of the Commission's Rules and Regulations. See also Title 5, Section 555(b) of the United States Code, Annotated, which guarantees a right to counsel for witnesses under the Administrative Procedure Act.

²⁹ *Speiser v. Randall*, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958); see also *K. Davis, Administrative Law Text*, §4.02, 4.03 (Hornbook ed 1959).

³⁰ See *Automobile Sales Company v. Bowles*, 58 F. Supp. 469 (D.C., Ohio 1945).

submitted that had there been afforded to Paxton and Watts representation by legal counsel in the *Pressley* proceeding, the further hearing proceedings under review here would not have been held in the first place.

CONCLUSION

Wherefore, the foregoing considered, the decision of the Commission under review must be affirmed.

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March 18, 1970.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,657

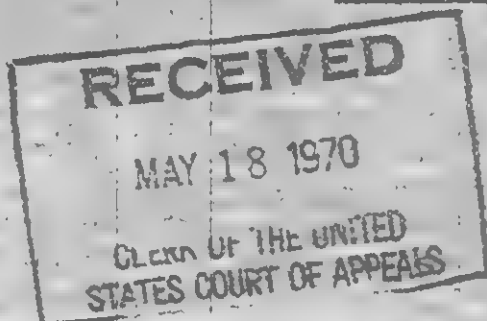
VERNON E. PRESSLEY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

WESTERN NORTH CAROLINA BROADCASTERS, INC.,
Intervenor.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION



United States Court of Appeals
for the District of Columbia Circuit

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with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,657

VERNON E. PRESSLEY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
WESTERN NORTH CAROLINA BROADCASTERS, INC.,
Intervenor.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES

Appellee agrees with the Statement of the Issues set forth on page (iv) of Appellant's brief.

This case has not previously been before the Court.

STATEMENT OF THE CASE

Appellant, Vernon E. Pressley, seeks review of a decision of the Federal Communications Commission (A. 57) granting after an evidentiary hearing the application of intervenor, Western North Carolina Broadcasters, Inc. (hereinafter Western), for renewal of its license to operate radio (AM) broadcast station WWIT at Canton, North Carolina.^{1/}

Because much of appellant's "Statement of the Case" (Br. pp. 2-15) is based on testimony which was rejected or which was admitted into evidence for limited purposes only, it is felt that a counter-statement based on the evidence received and the findings made will be helpful to the Court.

Certain questions raised in an earlier Commission proceeding involving Pressley and the principals of Western^{2/} led the Commission to designate for hearing intervenor-Western's renewal application to determine (1) whether the principals of Western failed to file in timely fashion a consulting agreement between Western and its

^{1/} The official citation to the Commission's decision (hereinafter Dec.) is 20 F.C.C. 2d 96 (October 15, 1969). The Hearing Examiner's initial decision (hereinafter I.D.) is officially reported at 20 F.C.C. 2d 103 (May 15, 1968).

^{2/} Vernon E. Pressley, 33 F.C.C. 838 (1962). As the Commission noted, the findings and conclusions made in that proceeding are not res judicata as to Western or its principals. See 20 F.C.C. 2d 103 n. 1; A 1.

prior stockholders, Beverly M. Middleton and Kermit Edney, as required by 47 CFR 1.613; (2) whether Dalton R. Paxton, Sidney A. Watts or other Western principals made misrepresentations to or concealed facts from the Commission concerning the total consideration between themselves and the prior holders of the majority stock interest in the licensee of WWIT, the transfer of control of which license was approved by the Commission on November 28, 1958; (3) whether Paxton, Watts, or other Western principals and agents promoted, supported, or otherwise participated in the preparation and filing of an application by B. E. Bryant for a new radio station for the purpose of impeding or obstructing the grant of Pressley's application for a new station at Canton, N.C.; and (4) whether Paxton or other Western principals made misrepresentations to or concealed facts from the Commission in the hearing which was held on the Pressley application. In light of the evidence adduced under these issues, it was to be determined whether Western possesses the character qualifications to be a licensee and whether grant of its renewal application would be in the public interest (I.D. Par. 1; 20 F.C.C. 2d 103-104; A. 1-2).

Alleged Misrepresentation And The Consulting Agreement

The facts as found by the Examiner regarding the consideration for the transfer of control of Western and the related consulting agreement are essentially undisputed.^{3/}

"On October 31, 1958, an application to transfer control of Western . . . was filed with the Commission. The transferors, and their ownership interests being transferred were: Beverly M. Middleton, 51.58 percent; Evelyn H. Middleton, 9.40 percent; Kermit Edney, 19.74 percent; and Donald A. Gilmore, 10 percent. The transferees were: Sidney A. Watts; W. Barry Medlin, Jr.; Dalton R. Paxton; Frieda H. Burress; David R. Riley; and Boice M. Watts, each to acquire a 15.2-percent interest. The consideration was listed as \$20,000 to be paid when the sale was consummated and an additional \$20,000 plus interest in monthly installments over 5 years. The Commission granted the application on November 28, 1958.

"The parties' actual understanding, which had been negotiated primarily by Middleton and Medlin, was somewhat broader (footnote omitted). As suggested by Middleton, it contemplated that, immediately following the consummation of the stock sale, Western North Carolina would execute an agreement whereby it would employ Middleton and Edney as consultants for 5 years at a collective salary of \$1,200 per month. Middle-

^{3/} Appellant Pressley took no exceptions to these findings by the Examiner.

ton asserts that his reason for proposing this arrangement was because the purchasers were without broadcast experience; if the corporation became insolvent the deferred payments under the stock purchase plan might be jeopardized; and the payments under the consulting contract would be paid out of day-to-day operations and were not to be the obligation of the individual stock purchasers.

"Prior to the filing of the transfer application, drafts of both the stock sale agreement and the consulting agreement were prepared by local North Carolina counsel and submitted to Washington communications counsel for review. However, the application as submitted made no reference to the consulting agreement.

"On December 22, 1958, the stock transfer was consummated and the consulting contract was executed. . . . On May 31, 1960, the consultation agreement was revised to provide that the then remaining balance of \$63,000 would be reduced to \$45,000 payable in annual installments of \$10,000 commencing June 1, 1960, with a final payment of \$5,000 payable June 1, 1964.

"Neither the consulting agreement nor its revision was filed with the Commission contemporaneously. . . .

"No evidence in this hearing established directly why the Commission was not earlier advised of the existence

of the consulting agreement. The details and mechanics of the filing of the transfer application had been left in the hands of Western North Carolina's communications counsel, a gentleman of considerable experience. While his testimony was unavailable due to his death in October of 1963, the essence of his advice to his clients may be gleaned from his response to a request for his opinion as to the propriety of including the aforementioned acceleration clause. In this instance, he asserted that the subject clause was 'OK as far as the FCC is concerned,' but might create tax problems. In reporting the matter for tax purposes Western North Carolina showed the payments under the consultation agreement as ordinary operating expenditures and Middleton reported his receipts as ordinary income." (I.D. pars. 3-8; 20 F.C.C. 2d 104-105; A. 2-3).

Both Western and the Commission's Broadcast Bureau took exceptions to the examiner's failure to make additional findings of fact pertinent to the transfer and consulting agreement. The Commission granted these exceptions in large part^{4/} and made additional findings. Based upon all of these facts, it concluded that Western's principals were not guilty of misrepresentation.

^{4/} Rulings on WWIT's exceptions 5-7, 20 F.C.C. 2d at 101; A. 63, and rulings on the Broadcast Bureau's exception 1, Id. at 102; A. 64.

The Commission found that "[t]here was testimony in this proceeding that the consulting agreement was part of the purchase price and also that the transferees needed the advice of Middleton and Edney. Watts and Paxton did not discuss the consulting agreement prior to the purchase of the stock. Watts thought that the consulting agreement was probably a common procedure and that it was a 'good deal' because it would give the purchasers the benefit of some firsthand experience in running a radio station. Watts was not aware of any tax advantages. Paxton's understanding was that he was obligated only under the stock purchase agreement and that additional payments were the obligation of the corporation (footnote omitted). In the application for transfer of control the parties mentioned, and submitted as an exhibit, the stock transfer agreement, but no mention was made of the consulting agreement. The application for transfer of control was signed on behalf of the transferors by Beverly M. Middleton and on behalf of the transferees by W. Barry Medlin, Jr., who is no longer a WWIT stockholder. On the basis of a letter which purports to have been signed in his behalf on October 7, 1958, we believe that the deceased attorney, Mr. Eliot Lovett, knew, when he submitted the application for transfer of control to the Commission, that a consulting agreement was contemplated." (Dec. par. 12; 20 F.C.C. 2d 99-100; A. 60 - 61).

"The consulting agreement was part of the purchase price. There is no satisfactory explanation as to why the consulting agreement was not filed with the transfer application. The consulting agreement had no bearing upon the transferees' financial qualifications because payments under the agreement were the obligation of the corporation and were not guaranteed by any of the individual transferees. While the examiner found that the nondisclosure of the consulting agreement was motivated by a desire to obtain a tax advantage for WWIT, he did not make findings on the following significant testimony. Attorney Scott P. Crampton, a tax specialist, testified at the hearing that there was an adequate disclosure of the consulting fees to the Internal Revenue Service and that he saw no motive from a tax standpoint for nondisclosure of the consulting agreement to the Federal Communications Commission. We thus conclude that WWIT had nothing to hide from the Commission; that it was not guilty of any misrepresentation; and that failure to file the agreement does not reflect adversely on the applicant's character qualifications (footnote omitted). Accordingly, we are convinced that the examiner's initial decision should be reversed and that WWIT's license should be renewed." (Dec. par. 14; 20 F.C.C. 2d 100; A. 61-62).

The Alleged Strike Application

The second major issue centers on whether Bryant's application was filed in order to impede or delay the grant of Pressley's application. The extent of the uncontested testimony going to this issue is very small. The Examiner's findings as to the background of the issue are that "Vernon E. Pressley, a lifelong resident of Canton had been employed at WWIT in a sales capacity from June of 1954 until October 31, 1958. His brothers, Joe B. Pressley and C. J. Pressley were also employed at the station; C. J. full-time and Joe B. as a part-time salesman. In the summer of 1958 Vernon Pressley heard the station was for sale and entered into negotiations for its purchase. He considered the asking price of \$103,000 for 90-92 percent of the stock too high (footnote omitted), and his counter offer of \$75,000 was rejected. Shortly thereafter he retained a consulting engineer from whom he ascertained that the frequency of 920 kc. was available for use in Canton. He decided to apply for such a facility, and this decision plus the offer of a better paying job at another station led him to resign at WWIT. (I.D. par. 9; 20 F.C.C. 2d 105-106; A. 3 - 4).

"In March of 1959, Vernon Pressley filed his application. The owners of station WWIT did not relish the prospect of competition and their reaction was sharply antagonistic. Joe B. Pressley was fired (the employment of C. J. Pressley had been terminated shortly after the new management took over). Watts,

one of WWIT's owners, attempted to buy up an old note of Vernon Pressley's in the hope of collecting it and thereby impairing Pressley's financial qualification to own a broadcast station. Dalton Paxton had the station's consulting engineer draw up an interference chart showing the extent to which Pressley's proposed station would cause interference to existing stations. On the basis of this chart he called to the attention of the management of two stations the fact that Pressley's proposed station would cause some interference to their signals, and that they had a right to oppose a grant of Pressley's application" (I.D. par. 10; 20 F.C.C. 2d 106; A. 4). These findings were unexcepted to and were adopted in substance by the Commission (Dec. par. 6; 20 F.C.C. 2d 98; A. 59).^{5/}

5/ Appellant's brief (pp. 8-9, 10) relies on the testimony of Vernon and Joe Pressley regarding two meetings between Vernon Pressley and Dalton Paxton. Pressley's testimony is in direct conflict with Paxton's testimony in this regard. As to the testimony regarding these meetings (and as to another meeting between the Pressley brothers and Sidney Watts) the Examiner found (I.D. par. 48; 20 F.C.C. 2d 114; A. 13):

The record also contains evidence as to two meetings between Vernon and/or Joe Pressley and principals of Western North Carolina. One meeting was with Paxton, the other with Watts. The evidence is conflicting as to who initiated the meetings and what transpired thereat. However, it is not material to the disposition of the designated issues to resolve these conflicts or to make findings of fact regarding the meetings. If the Pressleys' version were to be accepted it would only tend to demonstrate that Paxton and Watts were attempting to discourage prosecution of Vernon Pressley's application by various means not directly related to the Bryant application, and this point has already been made. If the Paxton-Watts version were accepted, the Pressleys would be put in a bad light, but resolution of the designated issues would not be advanced. Under such circumstances, no useful purpose would be served by a detailed analysis of the record or the composition of precise findings of fact.

Pressley did not take exception to this finding by the Examiner.

The basic testimony as to B. E. Bryant's application was given by Bryant, himself, who is not a party to this proceeding and who was Pressley's witness; Paxton, a Western principal; Hal Edwards, a former employee of Bryant's who was sponsored as a witness by Pressley; and Eugene Slatkin, a former WWIT employee whose own station license had been revoked primarily for misrepresentations and false statements to the Commission ^{6/} and who was sponsored as a witness in this proceeding by Pressley.

The Examiner found the testimony of Pressley's witnesses Slatkin and Edwards "entitled to no weight whatsoever in determining the facts. Slatkin is an out-and-out liar whose misrepresentations have required the Commission to revoke his license. He blatantly offered his testimony to Pressley for a price, even warning him that it was for sale to the highest bidder. On the very facts now at issue he has knowingly and deliberately sworn to irreconcilably conflicting versions of events. It is apparent that much of what he had said was false; and it would be sheer speculation to assert what portion, if any, of his various tales is true. Responsible men in the conduct of their affairs would be ill-advised to act upon the statements of

6/ Mountain View Broadcasting Co., 25 Pike & Fischer, R.R. 771 (1963).

any man who has displayed Slatkin's contempt for truth. This initial decision will not rely upon him.

"Edwards fares but little better. Assuming, arguendo, that his version of events was true, the Bryant application was a strike application from its inception and Edwards could not have failed to know it. For him to swear now that he did not become aware of its true nature until some time later is incredible, and the fact that he makes such assertion renders his whole testimony suspect. Moreover, his story is implausible in its basic premise. He asks the Commission to believe that he turned down Paxton's invitation to file in his own name because he lacked the resources to finance it, yet he claims Paxton was to furnish the financing himself. One assertion or the other must fall: either Paxton was going to put up the money, in which case there was no earthly need for Edwards to dilute his ownership share by bringing in Bryant; or Bryant was needed to capitalize the venture, in which case the assertion that Paxton was to finance it is false. When these fundamental incongruities are coupled with the inconsistencies of detail set forth at paragraphs 29 to 34, ^{7/}supra, it becomes very difficult to regard Edwards as a reliable witness. In addition, there are other impediments to crediting his testimony. Mr. Fred Sigman, a member of the bar and a disinterested witness, tells of events sharply conflicting with Edwards' version of the

7/ I.D. pars. 29-34; 20 F.C.C. 2d 109-110; A. 8-9 .

scope and extent of his own activities. Sigman's testimony reveals that at the time these events transpired, Edwards made no claim, even to the man he sought to employ as attorney, that Paxton was involved in the application. Of at least equal importance is the revelation that Edwards sought to raise a substantial sum of money in connection with the application, a fact wholly inconsistent with the claim that Paxton was financing the entire affair. Finally, there is the fact that Edwards, in effect, told Pressley that his testimony was for sale and named his price. . . . Plainly, Edwards' testimony is false in vital areas. He has forfeited the right to be believed, and no portion of this initial decision will rest upon his statements." (I.D. pars. 40-41; 20 F.C.C. 2d 112; A. 10-11).

No party took exception to these findings which the Commission adopted (see, Dec. par. 9 n. 7; 20 F.C.C. 2d 98 n. 7; A. 60).^{8/} Thus the basic findings as to the B. E. Bryant

^{8/} Although Slatkin's testimony was rejected as wholly unreliable, appellant's brief relies on it at p. 10. Appellant's brief (p. 9) also relies on the testimony of Vernon Pressley's brother, Joe B. Pressley, who testified as to matters he told Vernon that he had heard from Slatkin. The testimony was double hearsay and the Examiner admitted it only for the purpose of establishing what Joe told his brother Vernon (Tr. 611, 612, 613, 615-616; A. 142-144). Since what Joe told Vernon was not relevant to any of the issues in the proceedings, no findings were made on Joe Pressley's testimony. Pressley took no exceptions to the Examiner's failure to make such findings and the Commission likewise based no findings on Joe Pressley's testimony.

application and what its purpose was were based principally on the testimony of Bryant and Paxton. (The Examiner's findings in this regard are set out at I.D. pars. 14-28; 20 F.C.C. 2d at 106-109; A. 4-8).

Hal Edwards approached his former employer, B. E. Bryant, and alerted him to the availability of a frequency in Asheville, which was potentially profitable. This sounded good to Bryant, who telephoned Dalton Paxton, whom he knew and with whom he had worked a few years before. Bryant knew Paxton was in broadcasting, so he sought his advice. A local engineering consultant was unavailable and referred Bryant to Nugent S. Sharp, an engineer in Washington, D. C. Paxton and Bryant called Sharp, who found Bryant's proposal workable after a preliminary check and agreed to see Bryant in Washington the next day, April 26, 1960 (I.D. pars. 14-15; 20 F.C.C. 2d 106-107; Tr. 1019-1020; A. 4-5).

Bryant flew to Washington with Paxton because Bryant disliked traveling alone. They met with engineer Sharp, who accepted a retainer from Bryant and recommended a lawyer to help prepare Bryant's application. That lawyer was unable to take the case, but he recommended Washington communications attorney Sam Miller, whom Bryant visited and retained (I.D. pars. 16-17; 20 F.C.C. 2d 107; A. 5-6).

The engineer, Nugent Sharp, testified that he had never had any contact with Paxton prior to the Bryant-Paxton phone call to him on April 25, 1960. Paxton did not remain present during the entire meeting between Bryant and Sharp on the next day.^{9/}

Sharp told Bryant that he estimated the entire job would cost \$1500. Eventually it cost approximately \$1700, which Bryant paid by personal check. Sharp received nothing from Paxton or Western, and Sharp satisfied himself that Bryant's application was sincere, in good faith, and for the purpose of going on the air with an actual radio station (Tr. 994-995, 996, 998, 1001, 1022-1025, 1035-1036, 1036-1037; A. 189-197, 201-206).

During the course of April 27, 1960, Bryant's application was prepared at his home. Bryant asked Eugene Slatkin, a boyhood friend, to help prepare it since he had the experience and background of filing his own application with the Commission. Slatkin was a WWIT employee and Paxton allowed him to trade time with another WWIT employee in order to be free to help Bryant. Bryant paid Slatkin \$50 for his services. There was no evidence that any WWIT employee or principal, other than Slatkin, participated in the preparation of Bryant's application^{10/} (I.D. pars. 18-19; 20

^{9/} Appellant's statement (Br. p. 14) to the contrary is erroneous.

^{10/} Slatkin received a \$56 check from WWIT dated April 20, 1960, for services in developing a new program format for WWIT. There is no creditable evidence that this was in any way related to the Bryant application (I.D. par. 26; 20 F.C.C. 2d at 109; A. 7, and Dec. par. 9; 20 F.C.C. 2d at 98; A. 59-60).

F.C.C. 2d 107-108; A. 6, and Dec. par. 9; 20 F.C.C. 2d 98; A. 59-60).

Paxton came by Bryant's house on April 27 and, as a result of a prior discussion, bought a mineral interest from Bryant, who was at that time engaged in the promotion of oil property in Kentucky. There was no evidence that this transaction took place to enable Paxton to contribute to Bryant's application expenses (I.D. par. 20; 20 F.C.C. 2d 108; A. 6, and Dec. par. 8; 20 F.C.C. 2d 98; A. 59).

On April 29, Paxton and Bryant flew to Washington. Bryant paid the expenses and consulted with Nugent Sharp and attorney Miller, who reworked the application. Paxton saw his own lawyer on business and he thinks he went with Bryant on his visits to Sharp and Miller, but Bryant does not recall Paxton being present at the meetings (I.D. pars. 21, 27; 20 F.C.C. 2d at 108, 109; A. 6 and 7, and Dec. par. 7; 20 F.C.C. 2d at 98; A. 59). Nugent Sharp did not recall seeing Paxton on April 29 (Tr. 1005-1006; A. 198-199).

On the basis of this evidence, the Commission rejected the examiner's conclusion that Paxton provided money for Bryant to meet his expenses as an applicant, and it was unpersuaded that Paxton instigated Bryant's application. "Rather, we find that Bryant, after he had decided to apply for the radio license,

received a modicum of assistance from Paxton, a prior acquaintance" (Dec. par. 9; 20 F.C.C. 2d at 98; A. 59-60).^{11/}

On the issue of the strike application, the Commission concluded (Dec. par. 10; 20 F.C.C. 2d 99; A. 60):

In light of the evidence in this unusual case, we are not prepared to deny renewal of WWIT's license. Bryant appears to have been seriously interested in obtaining a license at Asheville, but he dismissed his application after the Broadcast Bureau raised a substantial question about the validity of his engineering proposal. Finally, we believe that Paxton's action, recognizing the potential advantage to WWIT of Bryant's application, is quite different from the act of instigating an application to compete with Pressley's application.

On these findings and conclusions the Commission based its ultimate determinations that Western's principals were qualified to be Commission licensees and that the grant^{12/} of Western's renewal application was in the public interest. From this determination Pressley appeals.

^{11/} Hal Edwards indicated that Paxton recruited Bryant as an applicant through Edwards, but the Examiner and the Commission rejected his testimony in light of his total unreliability as a witness (Dec. par. 9 n. 7; 20 F.C.C. 2d at 98 n. 7; A. 60 n. 7).

^{12/} The Commission also concluded "that no showing has been made that Paxton or any other principal of WWIT made misrepresentations or concealed facts in the Vernon E. Pressley, et al. proceeding." (Dec. par. 14 n. 10; 20 F.C.C. 2d 100 n. 10; A. 62). Pressley does not take issue with that conclusion on appeal.

ARGUMENT

I. THE COMMISSION'S DETERMINATION THAT THE APPLICANT WAS INNOCENT OF ANY MISREPRESENTATION REFLECTING ADVERSELY ON ITS CHARACTER QUALIFICATIONS HAD SUBSTANTIAL SUPPORT IN THE RECORD AND WAS A REASONABLE EXERCISE OF COMMISSION DISCRETION.

In light of the facts of record concerning Western's 1958 purchase of a majority of the stock of radio station ^{WWIT} WWIT, the Commission concluded that neither Paxton, Watts, nor other present Western principals misrepresented the purchase price of Western's stock and that their failure to file the consulting agreement did not reflect adversely on their character qualifications as licensees. This determination was clearly a reasonable one with ample support in the record.

It is undisputed that notice of the contemplated consulting agreement (between the transferors Middleton and Edney, on one hand, and the corporate licensee of WWIT, on the other) should have been filed with the Commission as a part of the transfer application. There is no evidence indicating that Watts, Paxton or any of the then, or present, principals of Western intended that it not be filed.^{13/} And, as the Commission observed, the information contained in the consulting agreement would not have affected approval of the transfer application, since it did not bear on the transferee's financial qualifications. Nor was there any other apparent motivation

^{13/} The terms of the transfer were negotiated by Barry Medlin, Jr., for the transferees. He is no longer a principal of WWIT (Dec. par. 12; 20 F.C.C. 2d 99; A. 61, and A. 154-155).

for not filing the agreement.^{14/} The attorney who actually submitted the application and who represented the transferors and later the new owners of WWIT died, and the record contains no specific explanation as to why notice of the contemplated agreement was not provided with the transfer application or as to why such agreement was not filed when executed (Dec. pars. 11-14; 20 F.C.C. 2d 99-100; A. 60-62).

Appellant does not contend that the failure to file the agreement was intentional, willful, or even that it represented negligence on the part of Western's principals. Rather, appellant contends that the mere failure to file, without more, constitutes a misrepresentation reflecting so adversely on the applicant's character qualifications that its renewal should be denied (Br. pp. 17-22). The Commission disagreed, determining that the failure to file, though violative of its rule, was not occasioned by an intent to deceive and did not, therefore, reflect adversely on the applicant's character qualifications.

The Commission acted well within its discretion in making this determination. It is well settled that "... it is the Commission, not the Courts which must be satisfied that the public interest will be served by renewing the license. And the fact that ... [the Court] might not have the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has

^{14/} The examiner felt the non-disclosure was motivated by a desire to obtain tax advantages; the Commission found otherwise, noting that the Examiner had failed to consider the testimony of a tax specialist that no such advantage would accrue from the failure to file (Dec. par. 14; 20 F.C.C. 2d 100; A. 61-62). See page 21, infra.

confided the problem to the latter." F.C.C. v. WOKO, 329 U.S. 223, 229 (1946).^{15/} Likewise, this Court has recently made clear that the finding of misrepresentation, vel non, and the weight to be accorded a misrepresentation, if found, are matters for the Commission's determination.

The case law under . . . [47 U.S.C. 308(b)] has made it clear that the Commission may weigh misrepresentations of fact by an applicant against his character qualifications. See, e.g., Charles P. B. Pinson, Inc. v. F.C.C., 116 U.S. App. D.C. 106, 321 F.2d 372 (1963). However, questions respecting misrepresentations of fact, are perforce, fact questions peculiarly within the province of the Commission to consider. As long as the Commission is cognizant of the issue raised and, upon the record, reasonably resolves that issue on behalf of the applicant, this court will not, and cannot, set that determination aside. WEBB, Inc. v. F.C.C., Case No. 22,526 (D.C. Cir., August 14, 1969), Slip Opinion p. 9.

^{16/} As the examiner pointed out, Issue 3 of the designation order presupposes that the Commission's rules required the filing of the consulting agreement when it was executed. The undisputed evidence established that it was not filed. But the Commission designated as an entirely separate issue the question whether the principals of Western misrepresented the consideration paid for

^{15/} In WOKO, supra, the Supreme Court found it within the Commission's discretion to deny renewal where one of the licensee's principals withheld facts from the Commission, not out of inadvertence, but purposefully over a period of twelve years. WOKO, supra, at 225-226 and 228-229. The Commission's denial of renewal in those circumstances is not inconsistent with its grant of renewal in the instant case.

^{16/} I.D. par. 58; 20 F.C.C. 2d at 116; A. 15 .

the transfer of the majority stock of the licensee. Thus, it appears clear that, contrary to appellant's contention, it was never contemplated that evidence of failure to file, without more, would prove misrepresentation.^{17/}

The Examiner recognized that "it is essential to determine whether . . . [the failure to report] was calculated or inadvertent." He found no evidence of calculation or intent in the record; however, he inferred intent by inferring motive from possible tax advantages.^{18/} The Commission on review noted that the Examiner's inference of a tax motive ignored the direct evidence of the expert witness that there could be no tax advantage from failure to file. Since the Examiner's inference of motive was the only support for his conclusion of intent and calculation, when the former inference collapsed so also collapsed the conclusion that the failure to file was not inadvertent. Appellant cites no instance where the Commission has concluded that inadvertent failure to file information constitutes a misrepresentation reflecting adversely on a licensee's character qualification

^{17/} "In a false representation or pretense, there is involved--alike in all varieties of offense, and in most civil cases as well as in criminal cases--the general notion of Intent to deceive. Within this, and usually decisive in showing it . . . is the element of Knowledge." 2 Wigmore, Evidence §321 (3d. ed. 1940).
^{18/} I.D. pars. 53, 55-57; 20 F.C.C. 2d 115-116; A. 14, 15.

^{19/}
and we know of none.

^{20/}
In Hall v. F.C.C., this Court held that the Commission need not disqualify an applicant even for a calculated, deliberate and not insignificant misrepresentation. Rather, the Commission may, if it chooses, consider other matters and circumstances which could on balance lead it to conclude that grant of an application was warranted. Id. at 103 U.S. App. D.C. 251. A fortiori, in

^{19/} The Commission did not, as appellant implies (Br. p. 20), grant WWIT's renewal because it found no motive for or materiality to an established misrepresentation. Rather it granted renewal because it found no misrepresentation by the principals of the applicant. This clearly distinguishes the present case from Independent Broadcasting Co. v. F.C.C., where the "evidence left no doubt as to misrepresentation and concealment," 89 U.S. App. D.C. 396, 398, 193 F.2d 900, 902 (1951); Saul Miller, where there was "abundant evidence aside from the factor of motive of Miller's misconduct," 1 F.C.C. 2d 1388, 1390 (Rev. Bd., 1965); and Broadcasting Service Organization, Inc., where the Commission found knowing misrepresentation, 11 F.C.C. 1057, 1069 (1947), affirmed per curiam 377 U.S. 901 (1949), reversing 84 U.S. App. D.C. 152, 171 F.2d 1007 (1948). The Ohio Valley Broadcasting Corp. decision (21 F.C.C. 678), merely clarified a hearing issue inquiring as to whether full disclosure of a transaction had been made to the Commission. Id. at 21 F.C.C. 682. Later events rendered specific findings on that issue unnecessary. Ohio Valley, 22 F.C.C. 745 (1957). In any event, the Commission's decision there, at 21 F.C.C. 681-82, is in no way inconsistent with its determination here.

Appellant also relies on Hall v. F.C.C., 99 U.S. App. D.C. 86, 237 F.2d 567 (1956), where this Court concluded that a misrepresentation is not excused because it is immaterial. But here, the Commission found no misrepresentation, ~~im~~material or otherwise. It found no intent to obscure anything from the Commission. Finally, Robinson v. F.C.C., 118 U.S. App. D.C. 144, 334 F.2d 534 (1964), cited by appellant as Palmetto, is also readily distinguishable for there the Court based its decision on the Commission's conclusion that the applicant had been willing to deceive the Commission. ^{20/} 103 U.S. App. D.C. 248, 257 F.2d 626 (1958).

the circumstances of this case, where there is no willfulness or even a pattern of conduct amounting to carelessness, the Commission could reasonably find that the failure to file the required material did not constitute culpable misrepresentation, and did not warrant denial of renewal.

Other decisions of this Court clearly support the Commission's decision. For example, in Community Broadcasting Corp. v. F.C.C.,^{21/} it was found that the Commission properly refused to disqualify or even to give an emphatic comparative demerit to an applicant which had failed to file required material where the Commission found there had been "no purpose to evade or deceive." Id., at 124 U.S. App. D.C. 231 n. 1. And in City Cabs, Inc. v. F.C.C.,^{22/} the Court affirmed the Commission's grant of a license to a non-broadcast applicant in whose application misstatements existed but where no willful or deliberate intent to deceive on the part of the applicant was found. So here, where the

^{21/} 124 U.S. App. D.C. 230, 363 F.2d 717 (1966).

^{22/} 107 U.S. App. D.C. 136, 275 F.2d 165 (1960).

Commission found that no willfulness or intent to misrepresent or conceal could be attributed, directly or by inference, to the applicant, it properly found no adverse reflection on the applicant's character.

The Commission has granted licenses to applicants who have failed to report relevant information and have reported erroneous information where it was determined that the licensee's derelictions were the result of negligence due to inexperience and not the result of willfulness. Beamon Advertising, Inc., 1 F.C.C. 2d 28, 42-47 (Rev. Bd., 1965), rev. denied 1 F.C.C. 2d 1612 (1965). It has been held no bar to the grant of an application that an "inaccurate representation" was found in an application where it stemmed from the applicant's "misjudgment and error and not from a wilful or deliberate attempt to deceive or mislead the Commission." Neil N. Levitt, 33 F.C.C. 720, 725 (Rev. Bd., 1962).

The "decision" in Raul Santiago Roman, 1 R.R. 2d 28 (1963), relied on by appellant is merely a hearing designation order. After the hearing, the examiner found that conceded "non-disclosure by the applicant . . . of information . . .

was neither wilful nor intended to conceal any facts from the Commission, nor intended in any way to mislead or deceive it." Raul Santiago Roman, 38 F.C.C. 299 at 316. The examiner concluded that the applicant was "qualified in all respects to be a licensee . . ." Id. at 319. On appeal, the Review Board determined ^{23/} on other grounds that the application could not be granted, but it affirmed the examiner's findings and conclusions as to the applicant's good faith and consequent character qualifications. Raul Santiago Roman, 38 F.C.C. 290 at 297-98, rulings on Exception numbers 6, 7, 22, 23, 24. Thus the findings and conclusions in Roman, supra, are wholly consistent with the decision in this case.

In sum, the Commission's finding that the applicant's principals harbored no intent to mislead the Commission and that the failure to file the consulting agreement was not willful has substantial support in the record. The Commission's conclusion that the innocent failure to report did not constitute a misrepresentation reflecting adversely on the applicant was clearly reasonable and well within the Commission's discretionary province.

^{23/} 38 F.C.C. 290 (1965), recon. den. 38 F.C.C. 619 (1965).

II. THE COMMISSION'S DETERMINATION THAT WESTERN'S PRINCIPALS AND AGENTS DID NOT PARTICIPATE IN A STRIKE APPLICATION WAS A REASONABLE ONE WITH SUBSTANTIAL SUPPORT IN THE RECORD.

As set forth above (p. 20), the resolution of fact questions is within the Commission's province and such resolution is dispositive if supported by substantial evidence. WEBR, Inc. v. F.C.C., Case No. 22,526 (D.C. Cir., Aug. 14, 1969), Slip Opinion pp. 1-2, 6 and 9; Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). See, Corbett v. F.C.C., Case No. 19,221 (D.C. Cir., Nov. 9, 1965), 6 Pike & Fischer, R.R. 2d 2023. In view of the imaginative and selective treatment of the record evidence in Pressley's brief (pp. 22-32), a review of what the record does reveal pertinent to the issue of B. E. Bryant's application is appropriate.

B. E. Bryant got the idea of obtaining a permit for an AM facility to operate in Asheville, North Carolina, on 920 KHZ from Hal Edwards, a former employee. He sought the permit with the intent to construct and operate the station which he felt would be a profitable venture. Paxton did not initiate or promote the idea to Bryant. Bryant sought Paxton's advice only after he had become interested in seeking the permit.^{24/}

^{24/} I.D. pars. 14-15; 20 F.C.C. 2d 106-107; A. 4-5; Dec. par. 10; 20 F.C.C. 2d 99; A. 60. See Tr. 1036-1037; A. 205-206.

The only basis for inferring that Paxton was an instigator or a moving force in the Bryant application came from Edwards' testimony. But Edwards, the examiner and the Commission each found, had forfeited the right to be believed. The examiner determined that "no portion of this initial decision will rest upon his statements." Nonetheless, some of the examiner's conclusions^{25/} did rest on Edwards' testimony. These were rejected by the Commission.^{26/}

The examiner thought it a "fortuitous coincidence" that Bryant sought Paxton's advice (I.D. par. 14 n. 6; 20 F.C.C. 2d 107 n. 6; A. 5). However, this ignores the obvious fact that Bryant could not turn to Asheville broadcasters since he was seeking to compete against them and it ignores the fact that Bryant knew Paxton and knew "he was in the radio business and knew something about it, I knew nothing." Tr. 156; A. 79 .

The Commission determined that Paxton gave no financial aid to Bryant. Paxton did buy a mineral lease from Bryant.^{27/} Appellant argues (Br. p. 28) that it may be inferred

^{25/} I.D. pars. 44, 45, 49, 50; 20 F.C.C. 2d 113-115; A. 12, 13-14.

^{26/} Dec. par. 9 n. 7; 20 F.C.C. 2d 98 n. 7; A. 60.

^{27/} Dec. pars. 7-8; 20 F.C.C. 2d 98; A. 59.

that this transaction was a sham because Paxton failed to record the lease and, further, because the amount of the lease, \$500, equaled the amount of Bryant's engineer's retainer. There is no evidence that Paxton's failure to record this lease was extraordinary or that Paxton knew the amount of the engineer's retainer.^{28/} Appellant also fails to consider the fact that Bryant paid a total of \$1700 to his Washington engineer and that, in addition, he paid unspecified legal fees to his Washington counsel, plus all of the other ordinary expenses incurred in connection with the preparation and prosecution of an application.^{29/}

At Bryant's request Paxton allowed his employee, Eugene Slatkin, to trade a duty day at WWIT with another employee so that Slatkin could help Bryant fill out his application.^{30/} This was a thoroughly reasonable request by Bryant, since Slatkin had recently undergone the experience of filling out his own application for a station permit and Bryant and Slatkin were from the same town and knew each other.^{31/}

Pressley argues (Br. p. 23) that a \$50 check which Paxton gave Slatkin for developing a new program format for WWIT was in reality for Slatkin's work on Bryant's application. This

^{28/} See Tr. 876; A.170-171. If in fact the failure to record had been an aberration from the norm, Paxton would hardly have indulged in it had he been attempting to perpetrate a "sham."

^{29/} Thus, when viewed in this totality, the \$500 which appellant tried to link to Paxton would not significantly contribute to the overall expenses of filing and prosecuting the application.

^{30/} I.D. pars. 18, 25; 20 F.C.C. 2d 107, 108; A. 6, 7 and Dec. par. 9; 20 F.C.C. 2d 98; A. 59-60.

^{31/} I.D. par. 18; 20 F.C.C. 2d 107; A. 6. See Tr. 199-200; A. 84.

imaginative theory lacks credible record support, ignores the record fact that Bryant, himself, paid Slatkin \$50 for filling out Bryant's application,^{32/} and defies common sense which would indicate that had Paxton, in fact, wanted secretly to pay Slatkin for work on Bryant's application he would have done so in cash avoiding the need for the elaborate plot hypothesized by appellant.^{33/} In any event " . . . the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

The foregoing are the facts of record concerning the filing of the Bryant application. It appears to be the thrust of appellant's argument (Br. pp. 22-32) that any participation by Paxton in Bryant's application with a desire to defeat Pressley's competing application renders Bryant's application a "strike" and warrants denial of Western's renewal application. As we have shown the evidence is such that the Commission could reasonably find that there was not a sufficient nexus between Paxton and the Bryant proposal to warrant a determination that the former abused

^{32/} I.D. par. 20; 20 F.C.C. 2d 108; A. 6 .

^{33/} Slatkin's own diverse versions of this incident (summarized at I.D. pars. 36-40; 20 F.C.C. 2d 111-112; A. 9-11) induce only incredulity and were rejected by both the examiner and the Commission.

the Commission's processes by instigating or sponsoring Bryant's application.

But aside from this, an analysis of relevant Commission decisions makes clear that appellant's brief inaccurately states the Commission's policy applicable to strike applications at the time the conduct here in question occurred. It is clear that at that time there was a reasonable basis for interpreting outstanding Commission decisions as standing for the proposition that an intent to build was the ultimate test as to whether or not a filing constituted a strike application.^{34/} In a decision adopted on the same day as its decision in the present case Commissioner Cox, writing for the Commission, recognized the reasonableness of that interpretation:

The WIDU/Al-Or filings took place in 1960 and 1961, almost ten years ago. . . . We note also, although advice of counsel cannot excuse

^{34/} The "strike" or "block" application issue stems from the representation made by all broadcast license applicants to the Commission that "this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict." F.C.C. Form 301, Application for Authority to Construct a New Broadcast Station License, Pike & Fischer, R.R. 4 Current Service 98:301-2. In Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1946), the Commission's brief expressed concern that a hearing requirement for mutually exclusive applications would encourage bad faith applications filed only to defeat other applicants. The Supreme Court expressed awareness of the problem when it stated "We hold only that where two bona fide applications are mutually exclusive . . ." a hearing is required, 326 U.S. at 333. After the Ashbacker decision the Commission amended the application form to include the above-quoted representation.

a clear breach of duty by a licensee, that the Al-Or application was filed only after Al-Or obtained the legal go-ahead from counsel who understood Commission precedent to be that the crucial consideration in matters of this nature was the presence of a good faith intent to construct and operate a station if an authorization were granted. Asheboro Broadcasting Co., 20 F.C.C. 2d 1, 3 (1969).

Bryant's good faith intent to pursue his application and to operate his facility upon grant has not been called in question.

In an early decision, Louisiana Broadcasting Co.,^{35/} the Commission had stated that the determinative question was "whether the applicant . . . acted in good faith in filing the application, i.e., whether they sought a construction permit with a sincere desire of constructing a station . . . or merely for the purpose of preventing a grant of . . . [another] application." Id. at 4 Pike & Fischer, R.R. 459. In Louisiana Broadcasting, the Commission disregarded the individual activities and motives of one member of the applicant corporation prior to its formation, because "once Weber associated himself with the applicant corporation, he fully intended to construct and put into operation a station at Baton Rouge Accordingly we must conclude that the application . . . was filed in good faith. . . ." Id. at 459-460. Since Bryant prosecuted and enlisted Paxton's aid in prosecuting his

^{35/} 4 Pike & Fischer, R.R. 441 (1949).

application for the purpose of obtaining a grant and operating a station, his application was bona fide and not a strike application under the Commission's Louisiana Broadcasting decision and its progeny.^{36/}

Subsequent to the events surrounding the Bryant application, the Commission adopted its decision in Capitol Broadcasting Co., 29 F.C.C. 677 (1960), relied on here by appellant. In 1956, Capitol filed an application to construct an AM facility on 730 kHz in Lansing Michigan. Later one W. A. Pomeroy filed an application for use of the same frequency at Tawas, Michigan. The two applications were mutually exclusive and Capitol suspected that Pomeroy had filed against it to protect an existing Lansing station (WILS), owned by Pomeroy and relatives. Roger S. Underhill, Capitol's president, with Capitol's knowledge and active support (a \$28,000 loan), filed an application to construct an AM facility at Tawas, which was not mutually exclusive with Pomeroy's application, but which would obviously compete with it if both were granted. Underhill obtained his permit and then attempted to sell it.

^{36/} Grand Haven Broadcasting Co., 14 F.C.C. 1236 (1950); Niagara Frontier Amusement Corp., 18 F.C.C. 559, 560 (1954), modified in other respects at 18 F.C.C. 556 (1954); Appalachian Broadcasting Corp., 11 Pike & Fischer, R.R. 1402 (1957); and Plainview Radio, 24 F.C.C. 405, 415-419 (1958).

The Commission concluded that Capitol must answer for Underhill's improprieties including misrepresentation of his financial backing from Capitol and his evasiveness and lack of candor as a witness. Coupling all these matters, the Commission denied Capitol's application. 29 F.C.C. 681-682. Upon reconsideration in Capitol,^{37/} the Commission stated that the prior decisions in the area were not controlling to the facts in Capitol and emphasized that Underhill's eagerness to sell his Tawes facility was inconsistent with his earlier expression of desire to own and operate the Tawes station. 30 F.C.C. 3. We emphasize that even if Capitol were applicable to the present case, the Bryant application does not fall within the Capitol standard, since the Commission found that the principals of Western did not financially back or support the Bryant application, that they did not instigate its filing, and that there was never any doubt cast on Bryant's intent to pursue his application and to construct and operate his station if he received a grant.^{38/}

^{37/} 30 F.C.C. 1 (1961).

^{38/} W. A. Pomeroy's application for Tawes was denied on unrelated grounds, but in dicta the Commission stated his application had been filed at least in part to impede Capitol and to that extent he acted in "bad faith." The Commission did not pass on its effect on his character qualifications. Capitol, 29 F.C.C. 682. On the basis of the record of Underhill's action in Capitol, the Commission revoked Underhill's license for his Tawes facility. Roger S. Underhill, 22 Pike & Fischer, R.R. 801 (1961).

In a decision subsequent to Capitol the Commission's Review Board noted:

The test formerly applied under the "strike" issue was whether the applicant intended to construct and operate a station. Johnston Broadcasting Co., 3 R.R. 1784 (1947); Grand Haven Broadcasting Company, 6 R.R. 452 (1950); Louisiana Broadcasting Company, 4 R.R. 441 (1948). Once this intent was shown, no additional showing was necessary to establish good faith filing. However, the Commission has more recently held that irrespective of a finding of intent to construct, an application can be denied where there exists an improper motive in the filing of the application, such as a desire to impede, obstruct, or delay grant of another application. Capitol Broadcasting Co., 29 FCC 677, 20 R.R. 979 (1960), reconsideration denied 30 FCC 1, 20 R.R. 1011 (1961). Under this inquiry, the applicant must assume the burden of proving that his application has been filed for a proper purpose. Blue Ridge Mountain Broadcasting Co., Inc., 37 F.C.C. 791, 800-801 (Rev. Bd. 1964). 39/

The Commission's finding that Bryant's application was neither instigated nor filed with any improper motive has firm basis in the record and dictates the conclusion that it did not constitute a strike application even under the Blue Ridge standard. In Blue Ridge, there was a close family relationship between the strike applicant and the beneficiary station (WCGA) and there was direct evidence that the owners of WCGA referred in private to the strike application as their own. 36 F.C.C. at 1350, 1352.

39/ Review denied by the Commission, Jan. 7, 1965 (FCC 65-5), affirmed per curiam sub nom. Gordon County Broadcasting Co. v. F.C.C., Case No. 19,165 (D.C. Cir. Sept. 8, 1965), 6 Pike & Fischer, R.R. 2d 2044.

There is no such evidence in the record here. In Blue Ridge, the strike applicant pursued a specific frequency with the knowledge that other, probably superior, frequencies could have been obtained without the expense of a comparative hearing. 36 F.C.C. at 1357. In the instant case no party even suggests the possibility of alternative feasible frequencies to the one pursued by Bryant. And unlike the instant case, there was evidence in Blue Ridge that the facility pursued was economically unsound and that the strike applicant was aware of that fact. 36 F.C.C. at 1356-1357.^{40/}

In Al-Or Broadcasting Co.^{41/} (also relied upon by appellant), WIDU, Inc., applied for a permit for Asheboro, North Carolina, whereupon the general manager of and the son of the majority stockholder in the licensee of WGWR, Asheboro, filed an application for Mebane, North Carolina, on the same frequency that WIDU sought. WIDU would compete with WGWR. The Mebane application was mutually exclusive with WIDU, but would not, if granted, compete with WGWR. Relying on the near identity of WGWR's ownership and management and that of the Mebane applicant, and the fact that the applicant was aware of

^{40/} The participation of WCGA's owners coupled with other serious violations of licensee standards resulted in the denial of renewal of the license for WCGA. John C. Roach, 20 F.C.C. 2d 255 (1969), recon. den. . FCC 70-202, released March 5, 1970, appeal pending Case No. 23,719, D.C. Cir.

^{41/} 37 F.C.C. 917 (Rev. Bd. 1964), review denied by Commission Feb. 11, 1965 (FCC 65-99), affirmed per curiam sub nom. Corbett v. F.C.C., Case No. 19,221 (D.C. Cir. Nov. 9, 1965), 6 Pike & Fischer, R.R. 2023.

other probably preferable frequencies (not mutually exclusive with WIDU) available in the area, the Commission concluded that the Mebane application was filed for strike purposes. 37 F.C.C. 923-924. These factors, crucial to the outcome in Al-Or,^{42/} are wholly lacking here.

As a result of the conduct evidenced in Al-Or, the Commission issued a show cause order contemplating the revocation of the license of WGWR, the beneficiary station. The hearing in that proceeding revealed that WGWR had supplied the strike applicant with substantial financial backing. The Commission concluded, however, that the present principals of WGWR were not unqualified to remain licensees. Asheboro Broadcasting Co., 20 F.C.C. 2d 1 (1969). Although the Commission found that the Al-Or application had been filed in part to block the WIDU application, it considered crucial that the events took place at a time when good faith intent to construct was the governing standard. Id. 20 F.C.C. 2d 3.

^{42/}Nearly identical factors (in allegation form) persuaded the Commission to designate a strike issue in Sumiton Broadcasting Co., 15 F.C.C. 2d 400 (1968), cited by appellant. Their absence in the Bryant application similarly distinguishes Sumiton from the present case.

Thus, if the conduct revealed in Asheboro, although constituting a strike application under the Capitol-Blue Ridge standard, was mitigated because some of it had occurred prior to the Capitol decision, clearly the conduct surrounding the Bryant application (legitimate under even the Capitol-Blue Ridge standard) could not be the basis for denial of Western's renewal application since the facts surrounding the Bryant filing all occurred in a pre-^{43/}Capitol setting.

In sum, the Commission concluded that Bryant sought his license for the legitimate purpose of constructing and operating a station, that Western's principals did not initiate, instigate or financially aid or back Bryant's application, and that Paxton's action in permitting an employee to trade duty time in order to be free to help Bryant fell far short of evidencing the existence of a strike application, whether defined under its then-prevailing or under its present-day standards. Resting as they do on substantial evidence, these conclusions should not be disturbed.

^{43/} On allegations of conduct similar to that found in the instant case, a petition to enlarge issues to include a strike issue was denied by the Review Board in Corinth Broadcasting Co., 9 F.C.C. 2d 864 (1967).

CONCLUSION

For the reasons set forth above, it is evident that the Commission's findings as to both the misrepresentation and strike application issues are based on substantial record evidence. The Commission's conclusion, based on these findings, that the actions of Western's principals do not reflect adversely on their character qualifications is clearly reasonable, and the Commission's grant of Western's application for renewal of license is likewise clearly reasonable. Accordingly, the decision here appealed from should be affirmed.

Respectfully submitted,

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
D. BIARD MacGUINEAS,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

March 18, 1970.

37-1

790

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,658

ABBETT, SOMMER & CO., INC.,
CHARLES W. SOMMER, III, and
ABBETT, SOMMER & CO. MORTGAGE CORP.,
Petitioners,

v.

SECURITIES & EXCHANGE COMMISSION,
Respondent.

*APPEAL FROM AN ORDER OF THE
SECURITIES & EXCHANGE COMMISSION*

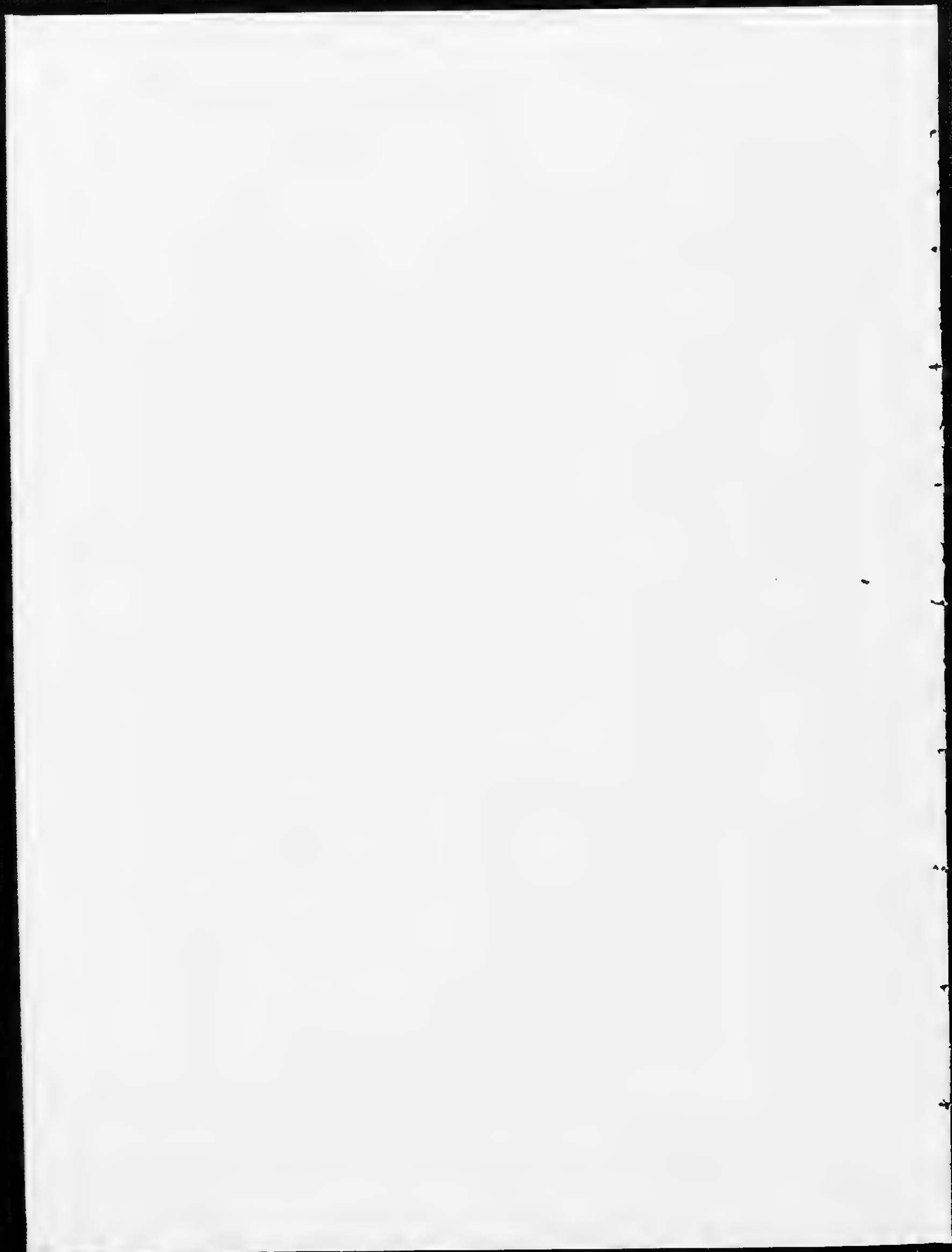
APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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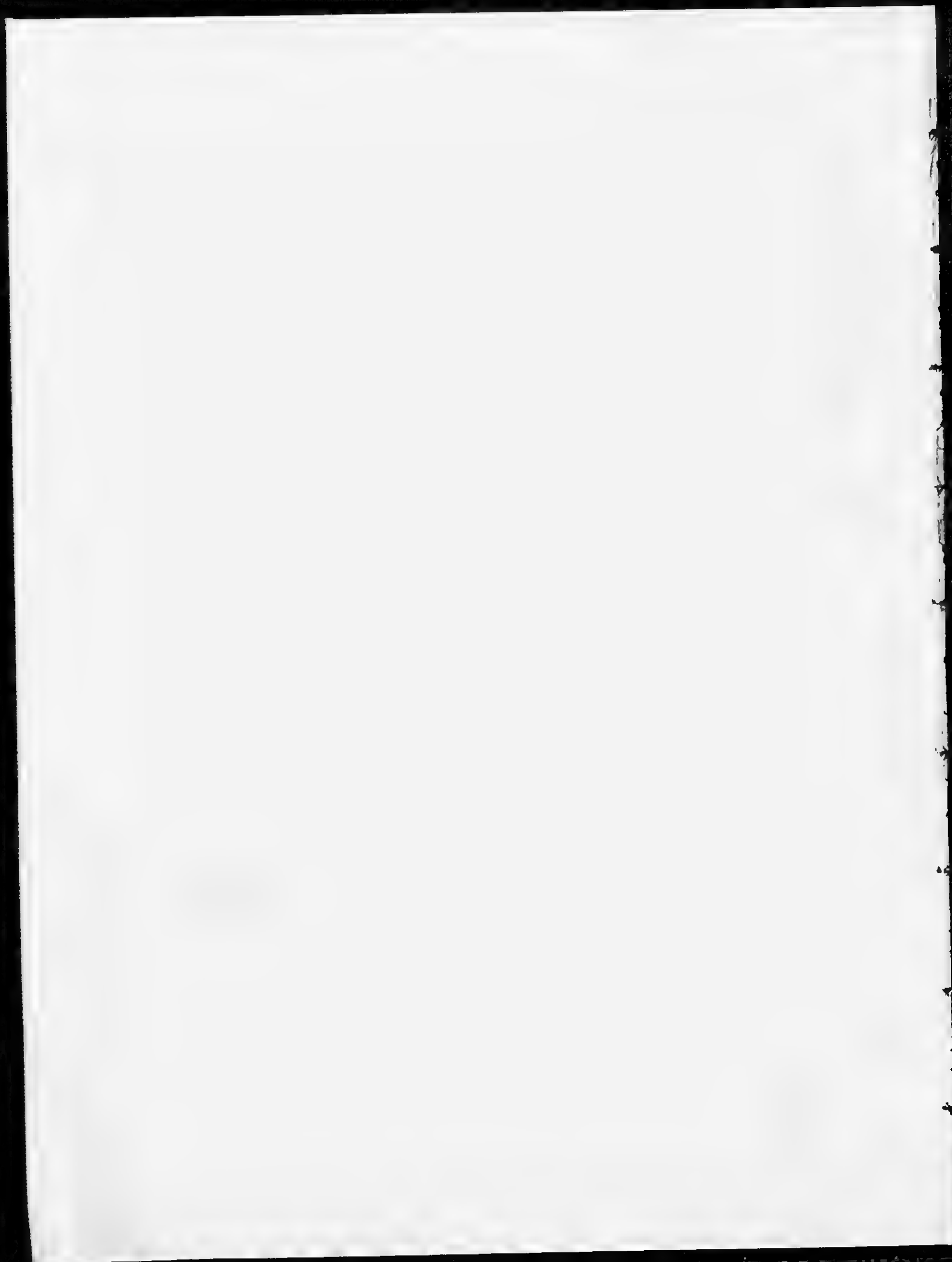
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APPENDIX A

(Securities Exchange Act Release No. 8741)

ADMINISTRATIVE PROCEEDING
FILE NO. 3-1510

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
November 10, 1969

In the Matter of

ABBETT, SOMMER & CO., INC.
251 University Plaza Bldg.
Forth Worth, Texas

(8-7035)

CHARLES W. SOMMER III
ABBETT, SOMMER & COMPANY
MORTGAGE CORPORATION

Securities Exchange Act of 1934 -
Sections 15(b), and 15A

FINDINGS,
OPINION
AND ORDER

BROKER-DEALER PROCEEDINGS

Fraudulent Representations in Offer and Sale
of Securities

Offer and Sale of Unregistered Securities

Noncompliance with Records Requirements

Where registered broker-dealer, its controlling person, and another company controlled by him made false and misleading representations in offer and sale of mortgage notes, which also involved unregistered investment contracts, concerning safety of investment and value of property in relation to amount of mortgage, in willful violation of antifraud and registration provisions of Securities Act of 1933 and Securities Exchange Act of 1934 and rules thereunder, and where broker-dealer and controlling person failed to maintain certain books and records, in willful violation of latter Act and applicable rule, held, in public interest to revoke broker-dealer's registration, expel it from membership in registered securities association, bar controlling person from association with broker-dealer, and find affiliated company to be a cause of such revocation.

Offering of Mortgage Notes Involving Investment
Contracts

Where, in purported reliance on Rule 234 under Securities Act which exempts from registration notes secured by first lien on real estate if offered in accordance with specified terms and conditions but provides that exemption is unavailable for any investment contracts involved in offering of notes, broker-dealer offered and sold mortgage notes obtained from note-discounter pursuant to

provided various services, including investigation of property and mortgagor, collection of monthly payments for investors, and undertaking to repurchase notes, held, investment contracts were involved in offering of notes and no exemption was available.

APPEARANCES:

Joan H. Saxer and Thomas W. McIlheran, of the Fort Worth Regional Office of the Commission, for the Division of Trading and Markets.

Carl L. Shipley, of Shipley, Akerman & Pickett, for respondents.

Following hearings in these proceedings pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act"), the hearing examiner filed an initial decision in which he concluded, among other things, that the registration as a broker and dealer of Abbett, Sommer & Co., Inc. ("registrant") should be revoked and registrant expelled from membership in the National Association of Securities Dealers, Inc.; that Charles W. Sommer III, registrant's president and sole stockholder, should be barred from association with a broker or dealer; and that Abbett, Sommer & Company Mortgage Corporation ("Mortgage Corp."), which is controlled by Sommer, should be found a cause of the revocation of registrant's registration. We granted a petition for review filed by the respondents, and briefs were filed by them and by our Division of Trading and Markets. On the basis of an independent review of the record and for the reasons set forth herein and in the initial decision, we make the following findings.

Violations in Offer and Sale of Mortgage Notes

We find, as did the examiner, that between December 1960 and April 1965 respondents, in connection with the offer and sale of certain mortgage notes, willfully violated, or willfully aided and abetted violations of, the antifraud provisions of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder and the registration provisions of Sections 5(a) and 5(c) of the Securities Act. The notes in question, generally executed by home owners for home improvements and secured by first mortgages on the properties, were purchased by respondents from Century Trust Company ("Century") or sold as agent for Century. That company was engaged in the business of buying such notes at a discount from building contractors and others and reselling them "with recourse" against it in the event of default by the note maker. 1/ Respondents sold over 600 of these notes to about 150 customers for more than \$1.3 million. 2/ The sales were effected by

-
- 1/ If a payment on a note was overdue by more than 90 days, Century agreed to repurchase the note from the investor at a price representing the total remaining principal balance of the investor's purchase cost.
 - 2/ In addition to the notes sold to respondents, a large number of notes were sold by Century to another finance company, to savings and loan associations, and to its stockholders.

registrant prior to July 1963, and thereafter by Mortgage Corp., which was organized for that purpose by Sommer and, as found by the examiner, "lacked a palpable identity distinct from" registrant since it had the same officers and employees and used registrant's stationery.

We agree with the examiner that materially false and misleading representations were made to customers by respondents, in letters or orally, in the offer and sale of the mortgage notes. These representations were to the effect that the notes were guaranteed in such a manner that "you can only gain" by investing in them, that the only risk was from inflation, that the notes were as safe as deposits in savings accounts, or that the notes were "as good as gold". The safety of such investment, however, was largely dependent on the financial ability of Century to repurchase notes in the event of default, 3/ which in turn was dependent on various factors including the profitability of its operations and the volume of notes presented for repurchase. While a note purchaser also had the security of the mortgaged property, foreclosure in the event of default in payments would likely be costly and time-consuming. Moreover, it was improper to compare the safety of the notes with savings account deposits, which are normally insured by a government agency. In addition, as found by the examiner, sales literature used by respondents falsely represented that the mortgage never exceeded 75% of the value of the property or that the value of the property normally was from two to six times the amount of the mortgage, when in fact the amount of the mortgage at times exceeded the entire value of the property.

Respondents argue that our Regional Office, although in frequent communication with them concerning sales literature and despite respondents' request for advice, never advised them that the literature violated the antifraud provisions. Apart from the question whether our staff was required to furnish such advice, 4/ however, there is no indication in the record that prior to commencement of its investigation following the period under consideration, our staff saw respondents' correspondence, or was aware of the oral representations referred to above or that the underlying property values were not as represented. It is no defense that some of the more sophisticated investors may have, as asserted, realized that an investment in mortgage notes was attended by inherent risks. 5/ And there is no basis for the intimation by respondents that investor witnesses were improperly coached by

3/ In April 1965, Century stopped honoring its recourse obligations because of financial difficulties which eventually culminated in bankruptcy proceedings.

4/ Cf. Capitol Leasing Corporation, Securities Exchange Act Release No. 4714, p. 5 (August 18, 1964).

5/ The record does not bear out respondents' assertion that the investor witnesses were all experienced business persons or sophisticated investors. We note that a number of them had been solicited to purchase the mortgage notes after responding to registrant's newspaper advertisements offering higher interest rates for savings and loan deposits. In any event, the sophistication of customers is irrelevant, and it is not necessary to show reliance on a broker-dealer's representations or that customers were in fact misled in order to establish violations of the antifraud provisions. See Hamilton Waters & Co., Inc., Securities Exchange Act Release

our staff, or for respondents' argument that the examiner should not have credited the testimony of "disappointed investors." 6/

The record also supports the finding of the examiner that the offer and sale of the notes, as to which no registration statement under the Securities Act had been filed or was in effect, were not exempt from the registration requirements of that Act pursuant to Rule 234 thereunder. That Rule exempts from registration promissory notes directly secured by a first lien on real estate if offered in accordance with specified terms and conditions, but provides that no exemption is available for any "investment contract ... the offering of which is involved" in the offering of the notes. 7/ Contrary to respondents' contention, an investment contract was involved in the offering of the mortgage notes.

The term "investment contract" is not defined in the Securities Act. However, the Courts and this Commission have concluded that various contracts which in form involved nothing more than the sale of interests in real estate or chattels were in fact investment contracts and therefore securities because accompanied by an offer of or representation concerning services upon which the investor relied to obtain a profit on his purchase. 8/

5 Continued/

No. 7725, p. 6 (October 18, 1965) and cases there cited; Richard N. Cea, Securities Exchange Act Release No. 8662, p. 6 (August 6, 1969); Richard J. Buck & Co., Securities Exchange Act Release No. 8482, p. 9 (December 31, 1968), aff'd sub nom. Hanly v. S.E.C., F.2d (C.A. 2, July 24, 1969).

6/ See Batkin & Co., 38 S.E.C. 436, 422, n. 11 (1958); Richard N. Cea, supra, at p. 7 of cited Release; Richard J. Buck & Co., supra, at p. 9 of cited Release.

7/ Investment contracts as well as notes are included within the definition of "security" in Section 2(1) of the Securities Act. While Rule 234 did not become effective until January 1961, shortly after registrant and Sommer began the sale of the mortgage notes, in pertinent respects the exemptive provisions which it superseded (Regulation A-R) contained essentially the same terms and conditions. And while that Regulation did not in terms specify that the exemption was not available for investment contracts involved in the offering of first lien notes, this had been our long-standing position. See Securities Act Release No. 3892 (January 31, 1958).

Among the conditions specified in Rule 234 is that the amount of the indebtedness secured shall not exceed 75% of the appraised value of the mortgaged property. As we have seen, the indebtedness at times exceeded the entire value of the property. In addition, a number of the notes sold by respondents were secured by a second, rather than a first, lien on the property. However, the instant review of the initial decision does not include issues as to compliance with the terms and conditions of the Rule and we make no adverse findings in these respects.

8/ See, e.g., S.E.C. v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) (assignments of oil leases on small tracts coupled with

In a public release issued in 1958, 9/ we stated that arrangements providing for various services to investors in connection with offerings of mortgages frequently constitute investment contracts. We enumerated some of the more common services and other arrangements which had come to our attention, each of which in our opinion would have a bearing on whether an investment contract was involved. Such arrangements include a complete investigation and placing service, the servicing of collection, payments and foreclosure, a guarantee against loss or provision of a market for the underlying security, advances of funds to protect the security of the investment, circumstances necessitating complete reliance on the seller such as the existence of great distances between the mortgaged property and the investor, and the selection by the seller of mortgages for investors. The release pointed out that "the wider the range of services offered and the more the investor must rely on the promoter or third party, the clearer it becomes that there is an investment contract." On the other hand, as noted in the release, where such services are offered, the fact that "the purchaser looks solely to his own mortgage or deed of trust for income or profits will [not] obviate the requirements for registration."

The record shows that Century investigated each note and mortgage to determine, among other things, the value of the underlying property, the existence of prior liens, and the credit standing of the mortgagor. While prospective investors, a large proportion of whom was solicited by respondents in the Fort Worth area of Texas, were free to inspect properties prior to purchase, this was seldom done, partly because many of the properties were located at a considerable distance from that area within Texas, and others were in Louisiana and at least one in Arkansas. 10/ In some instances, respondents, after ascertaining the amount which a customer wanted to invest, selected for him a note or notes approximating that amount. Century collected the monthly payments from the mortgagors and remitted them to the note purchasers. Although, as previously noted, it undertook to repurchase notes when any payment was more than 90 days delinquent, in a number of instances, where notemakers were delinquent in their payments, Century made such payments with its own funds. In addition, respondents represented to some purchasers that they would be willing to repurchase the notes at any time. In their sales literature respondents stressed the "guarantee" of the notes by Century, the strong

8 Continued/

seller's undertaking to drill test well); S.E.C. v. W. J. Howey Company, 328 U.S. 293 (1946) (sale of small tracts of land in citrus grove, coupled with contract for cultivating, marketing and remitting proceeds to investors); Blackwell v. Bentsen, 203 F.2d 690 (C.A. 5, 1953) (sale of tracts which were part of larger tract to be developed as citrus grove, coupled with management contract); Continental Marketing Corporation v. S.E.C., 387 F.2d 466 (C.A. 10, 1967) (sale of beavers which purchasers were encouraged to leave with a rancher for breeding); National Resources Corp., 8 S.E.C. 635 (1941) (assignments of oil and gas leases on small tracts, coupled with representation regarding drilling operations).

9/ "Public Offerings of Investment Contracts Providing for the Acquisition, Sale or Servicing of Mortgages or Deeds of Trust," Securities Act Release No. 3892 (January 31, 1958).

10/ For example, a widow residing in Fort Worth and later Houston invested about \$90,000 in 36 mortgage notes which were secured by

financial position of that company, the services provided by Century for the noteholders, and Century's record of prompt repurchase of defaulted mortgages.

We do not consider it significant that in the "investment contract" cases previously cited, the services were designed to create a profit, whereas in the present case the services were directed essentially toward minimizing the risk involved in the investment. In both types of situations, the investor relies upon the services and undertakings of others to secure the return of a profit to him. We are satisfied that, under the principles enunciated in the cases and stated in our release, the arrangements and representations pursuant to which the mortgage notes were offered gave rise to the creation of investment contracts within the meaning of Section 2(1) of the Securities Act. 11/

Respondents claim that we are estopped from finding that an exemption was unavailable because in October 1964, about six months before the close of the relevant period, our staff advised Century and Sommer that although the question whether Century's agreement to service the mortgage notes constituted an investment contract was not free from doubt, it appeared that the Rule 234 exemption would be available provided the notes were offered subject to the terms and conditions specified in the Rule.

Aside from the fact that the doctrine of estoppel cannot be invoked against the Commission, 12/ the record shows that the representations of Century's counsel, made in a July 1964 letter which Sommer saw and on which our staff's interpretation was essentially based, were as Sommer knew or should have known not in conformance with the facts or misleading in material respects. Inconsistent with the representation that the notes were secured by properties in Texas, some of the properties, as noted above, were located in Louisiana and Arkansas. While the record does not indicate that these out-of-state properties were farther removed from investors who purchased the notes relating to them than properties which might have been in remote parts of Texas, the difference in applicable laws would tend to increase the reliance of investors on Century. 13/ In addition, a representation that selection of the notes was made by the purchasers was misleading because, as noted above, at least in some instances respondents selected a note or notes for customers after ascertaining the amount they wanted to invest. Moreover, while Century's counsel represented to our staff that the only guarantee offered by Century was the "with

11/ Cf. Los Angeles Trust Deed and Mortgage Exchange v. S.E.C., 285 F.2d 162 (C.A. 9, 1960), cert. denied 366 U.S. 919.

12/ See John W. Yeaman, Inc., Securities Exchange Act Release No. 7527 (February 10, 1965), and the court decisions cited at p. 9, n. 16, of the Release.

13/ Century's president stated that Louisiana law relating to liens is quite different from Texas law and that foreclosure is more difficult and expensive in Louisiana.

recourse" endorsement, which became applicable in the event of a 90-day delinquency in payment by the note maker, as previously mentioned. Century occasionally made the payments itself and respondents represented to some purchasers that they would repurchase the notes at any time. Under the circumstances, respondents cannot shield themselves behind the staff interpretation, particularly in view of the indication by our staff that the question whether investment contracts were involved was not free from doubt. Respondents should have been aware that any deviation from the facts described to our staff that would cause investors to place more reliance on respondents or Century would be likely to bring the offering into the investment contract area.

Respondents further contend that any violations of the registration provisions were not willful. They assert that they relied in good faith on the advice of Century's counsel that an exemption was available for the offering of the notes, as well as on the interpretation by our staff in October 1964. They state that they had no power to bring about registration of the securities and claim that "at worst" they were engaged in good faith in broker-dealer transactions which are exempt from registration under Section 4 of the Securities Act.

With respect to the claimed reliance on Century's counsel, respondents apparently have reference to counsel's July 1964 letter to our staff as well as to a September 1960 letter by him to Century's president. It is well established that reliance on the advice of counsel does not negate willfulness. ^{14/} Moreover, as we have previously indicated, Sommer was or should have been aware that the representations in the 1964 letter were inaccurate or inadequate. And the 1960 letter merely stated that since the terms and conditions of our regulation were "apparently" being met, there was no need to register the notes. The letter did not discuss the services provided by Century with respect to the notes, much less those subsequently provided by respondents. Respondents therefore cannot claim to have relied in "good faith" on counsel's advice. ^{15/} Nor, in light of our discussion of the staff interpretation, is there any substance to respondents' claim of good faith reliance on it.

Respondents' remaining contentions are similarly without merit. Their asserted inability to bring about registration of the investment contracts by Century cannot excuse the sale of securities in violation of the registration provisions. Registrant and Mortgage Corp. were underwriters within the meaning of Section 2(11) of the Securities Act; ^{16/} or co-issuers with Century, and as such their sales were not exempt from registration. It is clear that respondents' violations of Section 5 were willful since they knew that no registration had been

^{14/} Gearhart & Otis, Inc., Securities Exchange Act Release No. 7329 (June 2, 1964), at p. 34 of cited Release, aff'd 348 F.2d 798 (C.A.D.C., 1965).

^{15/} Id., at p. 9, n. 13, of cited Release.

^{16/} That Section defines "underwriter" to include a person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security.

effected and they knew or should have known that no exemption was available. 17/

Violations of Record-Keeping Provisions

We also sustain the examiner's findings that registrant, willfully aided and abetted by Sommer, willfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. Inspections by our staff at various times between April 1960 and November 1966 disclosed, among other things, that certain records were not posted on a current basis, customers' accounts did not reflect the date of delivery or receipt of securities, receipts and deliveries of securities in and out of accounts with other brokers and dealers had not been recorded, securities position records were inaccurate, and memoranda of brokerage orders, instead of showing both time of entry and, to the extent feasible, time of execution, showed only one time of day without characterizing it.

Respondents concede that they made errors in record-keeping and do not challenge any of the examiner's specific findings of deficiencies. They assert that they sought the advice of certified public accountants and legal counsel and that, despite their repeated requests for guidance, our staff merely made vague and indefinite criticisms. However, as previously indicated, reliance on advice of counsel or other experts does not preclude a finding of willfulness. And, contrary to respondents' assertion, registrant was repeatedly advised of specific record-keeping deficiencies uncovered during inspections by our staff as well as admonished to comply with applicable requirements. In any event, registrant and Sommer cannot shift their responsibility in this respect to our staff. Certainly, they were aware that records must be accurate and current.

Other Matters

Respondents contend that they were not given an opportunity to achieve compliance prior to the institution of proceedings, as required by Section 9(b) of the Administrative Procedure Act ("APA") (5 U.S.C. § 558(c)). They further argue that the failure to make Century a party to these proceedings deprived them of a meaningful opportunity to defend themselves; that Section 7(c) of the APA (5 U.S.C. § 556(d)), requiring that administrative agency action be supported by "reliable, probative and substantial evidence," calls for considerably more than a preponderance of the evidence; and that respondents were denied their constitutional rights against self-incrimination by not being advised, during our staff's investigation, that they could claim a right not to testify or produce records and that the evidence obtained therefore cannot be used against them.

None of these arguments has any merit. These proceedings are within the exceptions expressly provided in Section 9(b) of the APA

17/ Cf. Strathmore Securities, Inc., Securities Exchange Act Release No. 8207, pp. 4, 8, 9-11 (December 13, 1967), aff'd 407 F.2d 722 (C.A.D.C., 1969); Armstrong, Jones and Company, Securities Exchange Act Release No. 8420, pp. 7-8 (October 3, 1968), appeal pending.

for cases of willfulness or those in which the public interest requires otherwise. ^{18/} Respondents have not indicated in what respects the failure to make Century a party hampered their defense. Moreover, in proceedings under the Exchange Act such as these, which are remedial rather than penal in nature, ^{19/} allegations of willful violations need be proven only by a preponderance of the evidence. ^{20/} Finally, the record shows, contrary to respondents' assertion, that when Sommer was called to testify during our staff's investigation, he was advised of his privilege against self-incrimination. And such privilege does not permit the withholding of corporate records ^{21/} or of "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." ^{22/}

Public Interest

In concluding that the public interest required the imposition of the designated sanctions upon the respective respondents, the examiner referred to the gravity and extended duration of their violations. He also stated that there were no mitigating factors and found that, on the contrary, Sommer was an evasive and argumentative witness, was slow and reluctant in producing records pursuant to subpoena and deliberately disposed of records of Mortgage Corp., after Century's financial difficulties became known, in order to prevent the use of such records against him. Respondents urge that the proposed sanctions are excessive, and that it would be unfair to "punish" them for the bankruptcy of Century and the resulting losses to investors. However, the sanctions are not based on the factors cited by respondents; indeed, in our opinion, the fraud violations alone would be sufficient to support them. The record reflects gross indifference by Sommer and his companies to basic requirements of the securities acts and the standards applicable to those engaged in the securities business,

^{18/} See Lile & Co., Inc., Securities Exchange Act Release No. 7644, p. 3 (July 9, 1965), and cases there cited; Dlugash v. S.E.C., 373 F.2d 107, 110 (C.A. 2, 1967).

^{19/} Wright v. S.E.C., 112 F.2d 89, 94 (C.A. 2, 1940); Pierce v. S.E.C., 239 F.2d 160, 163 (C.A. 9, 1956); Associated Securities Corp. v. S.E.C., 283 F.2d 773, 775 (C.A. 10, 1960); Blaise D'Antoni & Associates v. S.E.C., 289 F.2d 276, 277 (C.A. 5, 1961), reh'g denied 290 F.2d 688.

^{20/} See Norman Pollisky, Securities Exchange Act Release No. 8381, p. 9 (August 13, 1968); James De Mamos, Securities Exchange Act Release No. 8090, p. 5 (June 2, 1967), aff'd without opinion (C.A. 2, October 13, 1967).

^{21/} George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288-89 (1968).

^{22/} United States v. Shapiro, 335 U.S. 1, 33 (1948). See also Hayden Lynch & Co., Inc., Securities Exchange Act Release No. 7935, p. 10 (August 10, 1966).

which, taken together with the other factors noted by the examiner, make it in our view inconsistent with the public interest to permit their continuance in the securities business. 23/

Accordingly, IT IS ORDERED that the registration as a broker and dealer of Abbett, Sommer & Co., Inc., be, and it hereby is, revoked and that registrant be, and it hereby is, expelled from membership in the National Association of Securities Dealers, Inc.; that Charles W. Sommer III be, and he hereby is, barred from association with a broker or dealer; and that Abbett, Sommer & Company Mortgage Corporation be, and it hereby is, found a cause of the revocation of the registration of Abbett, Sommer & Co., Inc.

By the Commission (Chairman BUDGE and Commissioners OWENS, SMITH and NEEDHAM), Commissioner HERLONG not participating.

Orval L. DuBois
Secretary

Nelly A. Thorsen
By Nelly A. Thorsen
Assistant Secretary

23/ Respecting respondents' argument that such sanctions would amount to cruel and unusual punishment in violation of the Eighth Amendment, particularly since Sommer would be "barred for life from a gainful occupation," it suffices to point out as noted above that broker-dealer proceedings under the Exchange Act, which specifically authorizes the imposition of such sanctions, are remedial rather than penal in nature, and that under the Exchange Act and applicable rules Sommer is not precluded from applying for permission at some future time to reenter the securities business upon an appropriate showing.

Respondents' exceptions to the initial decision of the hearing examiner are overruled or sustained to the extent that they are inconsistent or in accord with our decision.

Received
1/18/69



APPENDIX B
EXCERPTED
BRIEF OF RESPONDENTS
BEFORE THE COMMISSION

**I. Petitioners' rights under the Administrative
Procedure Act and the Fifth
Amendment were violated.**

* * * Once the Regional Office determined that (in their opinion) a violation was taking place elementary fair play—to say nothing of common sense—would certainly require that the petitioners be given a reasonable opportunity to comply with the Office's ruling. * * *

* * * The Commission's attention is also respectfully directed to the statutory mandate of 5 USC 556 (d) which requires the SEC to substantiate its case by meeting the burden of "reliable, probative, and substantial evidence". * * *

* * * Disappointed investors simply cannot be considered as clear and convincing proof of fraud. * * *

* * *

**V. Willful wrongdoing was not established
according to law.**

* * * The record, however, is barren of any reliable, probative and substantial evidence to support such a conclusion and sanctions may only be imposed upon the basis of such evidence (5 USC 556 (d)). * * *

* * * Nor, needless to say, is there any such evidence that meets the statutory standards of the Administrative Procedure Act. * * *

1933 Series 1040
1933 Series 1040
1933 Series 1040

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23658

ABBETT, SOMMER & CO., INC.,
CHARLES W. SOMMER, III and
ABBETT, SOMMER AND COMPANY
MORTGAGE CORPORATION.

Respondents

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF OF RESPONDENT
SECURITIES AND EXCHANGE COMMISSION

PHILIP A. LOOMIS, JR.
General Counsel

WILLIAM F. NORTH
Associate General Counsel

THEODORE SONEN
Associate General Counsel

MATTHEW B. McGRATH
Attorney

Submitted and Verified under oath
Washington, D. C. 20004



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et seq.:

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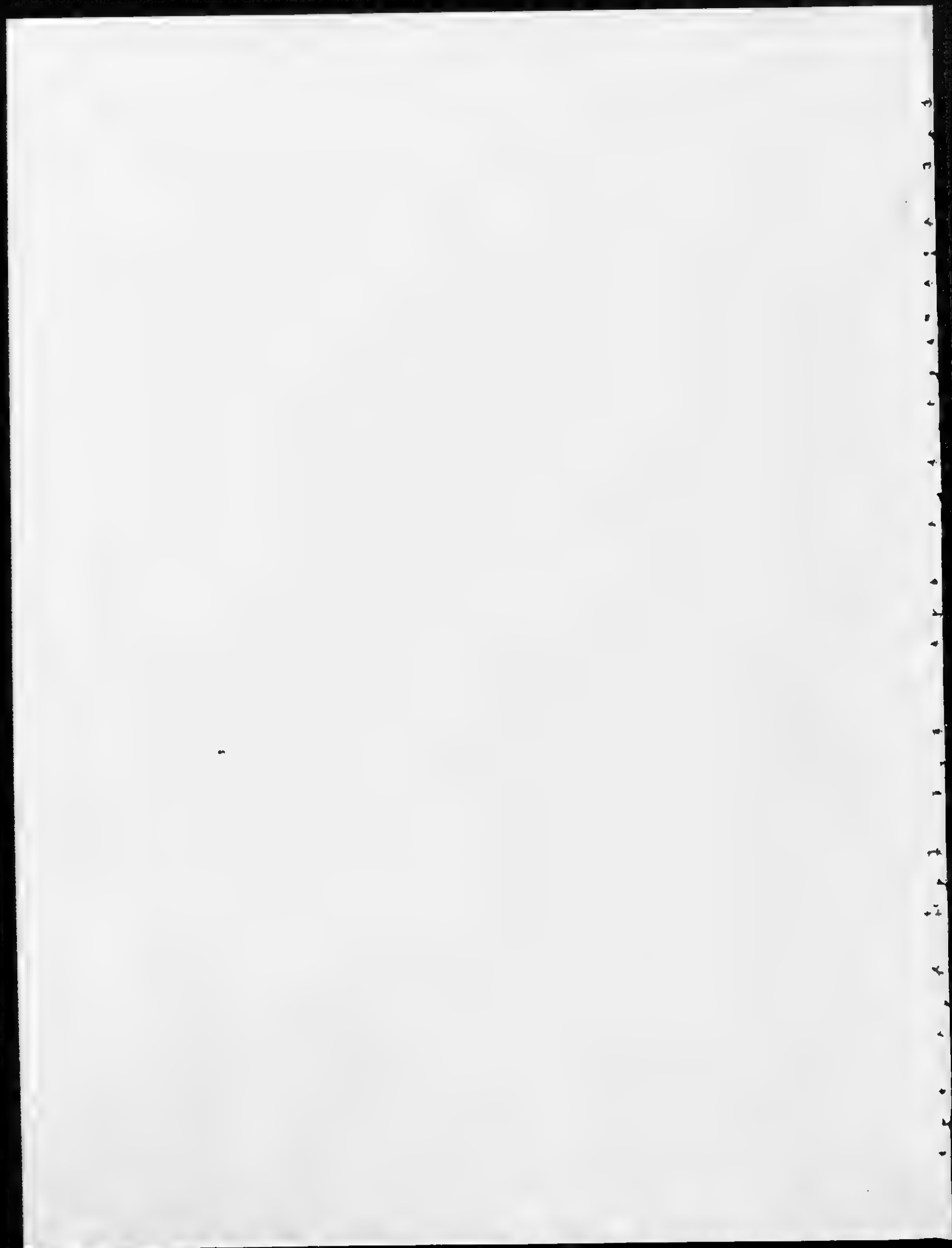
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*Cases or authorities chiefly relied upon are marked
by asterisks.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23658

ABBETT, SOMMER & CO., INC.
CHARLES W. SOMMER, III and
ABBETT, SOMMER & COMPANY
MORTGAGE CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF OF RESPONDENT
SECURITIES AND EXCHANGE COMMISSION

COUNTERSTATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

1. Whether the Commission's findings that petitioners committed willful violations of the antifraud, registration and record-keeping provisions of the federal securities laws are supported by substantial evidence in the record.
2. Whether the Commission, in barring petitioners from the securities business, based on findings of "willful" violations and "in the public interest," was required to give petitioners prior notice of the findings and an opportunity to comply.

This case was previously before this Court on petitioners' motion for a stay pending review which was denied by this Court on December 30, 1969.

COUNTERSTATEMENT OF THE CASE

Abbett, Sommer and Company, Inc. ("registrant"), Charles W. Sommer, III ("Sommer"), and Abbett, Sommer and Company Mortgage Corporation ("Mortgage Corporation") have petitioned this Court, pursuant to Section 25(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78y(a), to review an order (App. 1)^{1/}

^{1/} References to pages of the appendix are cited as "App. ____", and references to petitioners opening brief are cited as "Br. ____."

Although petitioners elected to defer filing of the appendix under Rule 30(c) of the Federal Rules of Appellate Procedure, they have not complied therewith. Instead of filing either page-proof copies of their brief or designating portions of the record to be included in the appendix and awaiting a similar designation by the Commission, petitioners, without prior notice to the Commission, filed an appendix with their brief, which contains only a copy of the Commission's opinion and a few quotations from the brief petitioners filed in the proceedings before the Commission.

However, petitioners do not allege error in the Commission's findings of fact and have referred to those findings for all statements of fact in their opening brief. We are also willing to rely on the facts as stated in the Commission's opinion, and for this reason have not designated additional portions of the record for inclusion in the appendix. Of course, upon request, the Commission will transmit the record or any part thereof to the Court.

of the Securities and Exchange Commission revoking the registration as a broker-dealer in securities of registrant, expelling registrant from membership in the National Association of Securities Dealers, Inc. ("NASD"), unconditionally barring Sommer, registrant's president and sole stockholder, from association with any broker or dealer, and finding Mortgage Corporation to be a cause of the revocation of Abbett, Sommer and Company's registration.

Following extensive hearings in these proceedings pursuant to Sections 15(b) and 15A of the Exchange Act, 15 U.S.C. 78o(b) and 78o-3, the hearing examiner rendered an initial decision in which he concluded, among other things, that Abbett, Sommer and Company's registration as a broker and dealer in securities should be revoked; that it should be expelled from membership in the NASD; that Sommer should be barred from association with any broker or dealer; and that Mortgage Corporation, which is controlled by Sommer, should be found a cause for the revocation (App. 2).

The Commission granted petitioners' petition for review of the hearing examiner's decision. On the basis of its independent review of the record, the Commission entered an order on November 10, 1969, in which it found, as had the examiner, that between December 1960 and April 1965, registrant, Sommer, and Mortgage Corporation, willfully violated, and willfully aided and abetted violations of, the antifraud

provisions of the federal securities laws ^{2/} and the registration provisions of the Securities Act of 1933 ("Securities Act"), ^{3/} in connection with the offer and sale of mortgage notes and investment contracts to public investors. (App. 2). In addition, the Commission found that petitioners willfully violated Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a), and Rule 17a-3 thereunder, 17 CFR 240.17a-3, relating to the maintenance of certain books and records (App.8).

As the Commission found, the notes in question were typically executed by home owners, as payments for home improvements, and were secured by first mortgages on the properties improved. Petitioners purchased these notes from, and sold them as agent for, Century Trust Company ("Century"). Century was in the business of buying these notes at a discount from building contractors and others, and reselling them "with recourse" (against Century) in the event of default by the note maker. (App. 2).

The Commission found that petitioners sold over 600 of these notes to approximately 150 customers, at prices totaling more than \$1.3 million. (App. 2). Prior to July 1963, sales were

^{2/} Section 17(a) of the Securities Act, 15 U.S.C. 77q(a); Sections 10(b) and 15(c)(1) of the Exchange Act, 15 U.S.C. 78j(b) and 78o(c)(1); and Rules 10b-5 and 15c1-2 thereunder, 17 CFR 240.10b-5 and 15c1-2.

^{3/} Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. 77e(a) and 77e(c).

made by registrant and thereafter by the Mortgage Corporation, which the Commission described as being "organized for that purpose by Sommer and, as found by the examiner, 'lacked a palpable identity distinct from' registrant since it had the same officers and employees and used registrant's stationery." (App. 3).

The Commission found that petitioners willfully made "materially false and misleading representations" to customers, orally and in writing, in connection with the offer and sale of these notes. For example, the Commission found that petitioners advised customers that investments in these notes were as safe as savings account deposits, without pointing out that savings accounts are normally government insured and these notes were not so insured; that petitioners told customers that the notes were "'as good as gold,'" and "that the notes were guaranteed in such a manner that 'you can only gain' by investing in them, that the only risk was from inflation.'" (App. 3). The Commission further found that petitioners' sales literature falsely represented that the face amount of the notes never exceeded 75% of the value of the mortgage property, and that the value of the property normally was from two to six times the amount of the mortgage, when in fact the mortgages sometimes exceeded the entire value of such property (App. 3). Furthermore, the Commission found petitioners failed to disclose to investors the fact that the safety of the investment was largely dependent upon the financial ability of

Century to honor its repurchase obligation, which ability would vary greatly according to such factors as its profits and the number of notes presented for repurchase. (App. 3). In fact, financial difficulties which eventually led to bankruptcy proceedings caused Century to stop honoring its recourse obligations in April 1965 (App. 3 n. 3). Moreover, the Commission pointed out that customers were not informed that foreclosure on the mortgaged property securing their notes was an expensive and time-consuming procedure and did not provide the absolute safety promised by petitioners. (App. 3).

The Commission also found that the offer and sale of the mortgage notes involved an "investment contract" within the meaning of the Securities Act, and that petitioners knew or should have known that no exemption from the registration requirements of that Act was available.^{4/} (App. 3).

^{4/} As found by the Commission, the services offered by Century in connection with the sale of these notes included an investigation of the value of the property securing each note and mortgage offered for sale, a credit check of the makers, and a search for prior liens. Century collected and remitted to investors monthly payments on the notes. In some instances, Century made payments for delinquent note makers with its own funds, despite its agreement or obligation to repurchase notes when any payment was overdue by more than 90 days. Petitioners' sales literature emphasized the services provided by Century for the noteholders, the sound finances of that company, its guarantee of the notes, and record of prompt repurchase of defaults (App. 5-6).

The Commission found that these services established the existence of an investment contract under the statute and case law which existed at the time of the violations. (App. 4). See "Public Offerings of Investment Contracts Providing for the Acquisition, Sale or Servicing of Mortgages or Deeds of Trust," Securities Act Release No. 3892, [1957-1961 Transfer Binder] CCH Fed. Sec. L. Rep. ¶76,559 (January 31, 1958).

The Commission rejected petitioners' claim of good faith reliance on the advice of Century's counsel and on the interpretation of the Commission's staff in October 1964 concerning whether an exemption from registration was available for the offer and sale of these notes. (App. 6-7). The Commission found that petitioners knew or should have known that the facts on which both the opinions of counsel for Century and the staff interpretation were based did not conform to the realities of the situation. Neither the letter of counsel nor the staff interpretation discussed the full extent of the services provided investors by Century and petitioners, including the facts that on occasion notes were selected not by customers, but by petitioners, and that Century went beyond its 90-day repurchase agreement and made payments to cover delinquencies on notes. (App. 6-7). The Commission found that petitioners should have known these facts were "likely to bring the offering into the investment contract area." (App. 7).^{5/} Accordingly, the Commission found that petitioners' violations of the registration requirements were willful since they knew that no registration statement had been filed and knew or should have known that no exemption was available (App. 6-7).

^{5/} The Commission noted other facts, including that certain of these notes were secured by second, not first, liens on real property and that other notes were for amounts exceeding 75% of the appraised values of the mortgaged property, which brought these notes outside the exemption provided by Rule 234 under the Securities Act, 17 CFR 230.234, but did not base its findings of registration violations on these factors (App. 4 n. 7).

In considering what sanctions ought to be imposed upon petitioners "in the public interest," the Commission stated:

"The record reflects gross indifference by Sommer and his companies to basic requirements of the securities acts and the standards applicable to those engaged in the securities business, which, taken together with the other factors noted by the examiner, make it in our view inconsistent with the public interest to permit their continuance in the securities business." (App. 9-10).

STATUTES AND RULES INVOLVED

Sections 7(c) and 9(b) of the Administrative Procedure Act, 5 U.S.C. 556(d) and 558(c); Sections 5(a), 5(c) and 17(a) of the Securities Act, 15 U.S.C. 77e(a), 77e(c) and 77q(a); Sections 10(b), 15(b), 15(c), 15A, 17(a) and 25(a) of the Exchange Act, 15 U.S.C. 78j(b), 78o(b), 78o(c), 78o-3, 78q(a) and 78y(a); and pertinent rules under these statutes are set forth in the statutory appendix (see pp. 1a to 18a, infra).

ARGUMENT

- I. THE COMMISSION CORRECTLY FOUND THAT PETITIONERS PARTICIPATED IN WILLFUL VIOLATIONS OF THE ANTIFRAUD, REGISTRATION, AND RECORDKEEPING PROVISIONS OF THE FEDERAL SECURITIES LAWS AND THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THESE FINDINGS.

In their brief (Br. 4-5), petitioners do not contend that any specific findings of fact by the Commission are in error. Rather, petitioners argue that the Commission applied an incorrect standard of proof to the evidence on which it based its findings, and in doing so ignored the requirements of Section 7(c) of the Administrative Procedure Act ("APA") and Section 25(a) of the Exchange Act (Br. 4).

The Commission based its findings on a "preponderance of the evidence." Petitioners contend that this was error, arguing "that Section 7(d) [sic] of the Administrative Procedure Act requires that the minimal quality of evidence which will support findings of an administrative agency be supported by 'reliable, probative, and substantive [sic] evidence'" (footnotes omitted), and that "preponderance of the evidence" is a "weaker test" (Br. 4). In addition, petitioners contend that the Commission was required to apply the standard of "clear and convincing evidence" to proof of the fraud allegations because those allegations, when proved, led to their expulsion from the securities business. (Br. 7-8).

A reading of the Commission's opinion, as well as the cases and statutes cited by petitioners in support of their argument, (Br. 4-5) clearly shows that the Commission did not apply a less exacting standard of proof to its findings than that required by the APA or the Exchange Act.

To the contrary, the Commission held that proof by a preponderance of the evidence did meet the requirements of Section 7(c) of the APA and clearly implied that they considered "a preponderance of the evidence" to be a stricter test than simply

proof by "reliable, probative, and substantial evidence"

(App. 8-9).^{6/}

The Commission's definition of preponderance of the evidence as at least an equal, if not higher, standard than substantial evidence is supported by this Court's opinion in National Council of American-Soviet Friendship v. Subversive Activities Control Board, 116 U.S. App. D.C. 162, 322 F. 2d 375 (1963),

^{6/} Petitioners erroneously attribute the following statement to the Commission in its opinion (although petitioners' omission of quotation marks makes it difficult to determine exactly what they intend to include):

"'willful violations' need not be proved by substantial evidence, but need be proved only by a preponderance of the evidence." (Br. 4).

What the Commission actually said in its opinion with regard to the applicable standard of proof is as follows:

"They [petitioners] further argue . . . that Section 7(c) of the Administrative Procedure Act (5 U.S.C. §556(d), requiring that administrative agency action be supported by 'reliable, probative and substantial evidence,' calls for considerably more than a preponderance of the evidence." (App. 8).

The Commission went on to say that this argument had no merit, (App. 8) and

"[m]oreover, in proceedings under the Exchange Act such as these, which are remedial rather than penal in nature, allegations of willful violations need be proven only by a preponderance of the evidence." (App. 9). (Footnotes omitted.)

in which "preponderance of the proof" was defined as follows:

"This term means something more than the term 'substantial evidence,' sometimes used by the Congress and frequently by the courts We are of the view that the term means that the evidence must be substantial and moreover must preponderate." 116 U.S. App. D.C. 162, 175, 322 F.2d 375, 388.

Accord, Wright v. Securities and Exchange Commission, 112 F.2d 89 (C.A. 2, 1940).^{7/}

Petitioners are also mistaken in their contention that fraud under the securities laws must be proved by clear and convincing evidence. As the courts have consistently held, broker-dealer revocation proceedings are remedial and not penal in nature. Their purpose is to protect the public from future

^{7/} Petitioners erroneously cite the Wright case in support of their theory that proof by a preponderance of the evidence does not meet the Administrative Procedure Act requirements (Br. 4). In that opinion the Second Circuit also recognized that a fair preponderance of the evidence is a higher standard than substantial evidence. This is obvious when the quotation used by petitioner (Br. 4-5) is read together with the sentence immediately preceding and immediately following it in the court's opinion:

"Since the purpose of the order is remedial, not penal, there is no basis for the contention that Wright's violation of the statute must be proved beyond a reasonable doubt. [Citing cases.] Nor can we accept the alternative argument that at least a fair preponderance of the evidence is required. The statute declares in Section 25, 15 U.S.C. A. §78y, that the Commission's findings of fact shall be conclusive if supported by substantial evidence. . . ." 112 F.2d 89, 94 (C.A. 2 1940).

violations by persons who have shown themselves to be unqualified to participate in so sensitive a business. Their purpose is not to punish an individual for past misconduct. Berko v. Securities and Exchange Commission, 316 F.2d 137, 141 (C.A. 2, 1963).^{8/} This is also true of civil proceedings under the antifraud provisions of the securities laws. As the Supreme Court said in Securities and Exchange Commission v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963) ". . . securities legislation 'enacted for the purpose of avoiding frauds,' [is to be construed] not technically and restrictively, but flexibly to effectuate its remedial purposes."^{9/} Thus it is clear that the traditional "preponderance of the evidence" or substantial evidence is the appropriate standard of proof in proceedings involving fraud before the Commission. Wright v. Securities and Exchange Commission, *supra*, 112 F. 2d at 94; Berko v. Securities and Exchange Commission, *supra*, 316 F.2d at 142.

^{8/} Accord, e.g., Blaise, D'Antoni & Associates v. Securities and Exchange Commission, 289 F.2d 276, 277 (C.A. 5, 1961), rehearing denied per curiam, 290 F.2d 688 (C.A. 5, 1961), certiorari denied 368 U.S. 899 (1961); Associated Securities Corporation v. Securities and Exchange Commission, 283 F.2d 773, 775 (C.A. 10, 1960); Pierce v. Securities and Exchange Commission, 239 F.2d 160, 163 (C.A. 9, 1956); Wright v. Securities and Exchange Commission, 112 F.2d 89, 94 (C.A. 2, 1940) (expulsion from membership in national securities exchange).

^{9/} When securities law violations have occurred which are considered penal in nature, appropriate criminal penalties are sought by the Attorney General. See, e.g., Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e).

Petitioners cite Bridges v. Wixon, 326 U.S. 135 (1945); Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966), and several other deportation cases, in support of their contentions (Br. 7 nn. 20 & 21). Although the Supreme Court held in Woodby that the standard of proof required in a deportation proceeding is "clear, unequivocal, and convincing evidence," ³ 385 U.S. at 277, it is obvious that this was due to the Court's recognition of the extreme harshness of the sanction involved, which is equivalent to banishment. "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." Woodby, 385 U.S. at 285.

Deportation proceedings involve a special area of the law and are clearly distinguishable from civil proceedings under the federal securities laws. Under Section 241 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251, deportation automatically follows a finding that the individual engaged in certain proscribed conduct. Different considerations are involved in the present case, when the most severe sanction available is exclusion from the securities business and, under Section 15(b)(7) of the Exchange Act, an express finding that this remedy is "in the public interest" is required.

Petitioners also rely (Br. 8-9) upon a reference in the Woodby opinion to the high standard of proof "imposed in cases involving allegations of civil fraud. . . ." 385 U.S. at 285 n.18. This reference was based upon a citation of 9 Wigmore, Evidence §2498 (3rd ed. 1940). A review of the cases cited for this purpose in Wigmore indicates that the Court's reference to "cases involving allegations of civil fraud . . ." was not intended to encompass cases under the statutory antifraud provisions of the federal securities laws. Furthermore, we know of no Commission enforcement proceeding or private action under the securities laws in which the application of such a severe standard has ever been required.

The precise issue urged here by petitioners was also urged and rejected in DeMammos v. Securities and Exchange Commission, aff'd from the bench, C.A. 2, Docket No. 31469 (October 13, 1967). In that case the Commission had expressly held that the preponderance of the evidence was the appropriate standard of proof in such proceedings. See James DeMammos, Securities Exchange Act Release No. 8090 at 5 (June 2, 1967).

Moreover, as petitioners acknowledge in their brief, (Br. 5), Section 25(a) of the Exchange Act provides, in pertinent part, that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

Section 7(c) of the APA contains a similar provision that:

" . . . A sanction may not be imposed or rule or order issued except upon consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence"

The courts have consistently held that an administrative agency's findings of fact are presumed to be supported by substantial evidence, and that a petitioner who challenges those findings must specifically designate the findings for which he claims that there is no substantial evidence in the record.^{10/} Petitioners have not questioned the sufficiency of the evidence in the record to support the specific findings of the Commission. Since the Commission applied the proper standard of proof to its findings of fact, as we have shown in the foregoing discussion, it must be concluded that the facts as found by the Commission are supported by substantial evidence in the record, and that under Section 25(a) of the Exchange Act, 15 U.S.C. 78j(a), the Commission's findings are conclusive and should be upheld by this Court.

^{10/} E.g., Keele Hair & Scalp Specialists v. Federal Trade Commission, 275 F.2d 18 (C.A. 5, 1960); Steelco Stainless Steel v. Federal Trade Commission, 187 F.2d 693, 694-695 (C.A. 7, 1951).

II. THE COMMISSION PROPERLY ORDERED PETITIONERS BARRED FROM THE SECURITIES INDUSTRY WITHOUT PRIOR NOTICE AND WITHOUT AFFORDING THEM A PRIOR OPPORTUNITY TO COMPLY WITH THE LAW.

Petitioners assert (Br. 8) that the Commission incorrectly barred them from the securities business without giving them prior notice and an opportunity to comply, as set forth in Section 9(b) of the Administrative Procedure Act.^{11/} Clearly, however, this is a case in which prior notice and an opportunity to comply are not required.

The Commission found that the proceedings below were within the exceptions for cases of "willfulness" or "public interest" expressly contained in Section 9(b) of the APA^{12/} (App. 9). Indeed,

^{11/} Section 9(b), 5 U.S.C. 558(c), provides (in pertinent part):

Except in cases of willfulness or those in which the public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements (emphasis added).

^{12/} Section 9(b) requires that the Commission meet only one of the two exceptions, i.e., a case of willfulness or required by the public interest, to impose sanctions without notice and a prior opportunity to comply. In this case, the Commission met both exceptions, finding that petitioners' violations were willful (App. 2) and that their continuation in the securities business was "inconsistent with the public interest" (App. 9).

Section 15(b) of the Exchange Act requires that a finding of willfulness be made before the Commission can impose sanctions under that section.

Petitioners do not contest the Commission's findings that their activities were in violation of the securities laws. Instead, they argue (1) that their violations were not "willful" within the meaning of Section 9(b) of the APA because the Commission applied an allegedly different definition of willfulness, i.e., the one used under the Exchange Act, in reaching its findings; and (2) that in any case petitioners' conduct was not willful because they relied in good faith on the advice of counsel and the Commission's staff letter of October, 1964 (Br. 8-11).

As this Court noted in Shuck v. Securities and Exchange Commission, 105 U.S. App. D.C. 72, 264 F.2d 358 (1958), if there is a finding of willfulness under Section 15(b) of the Exchange Act, "then of course there would be no problem of complying with the requirements of Section 9(b) of the Administrative Procedure Act, since in a case of wilfulness, no written notice or opportunity for compliance would be necessary" (citation omitted). 105 U.S. App. D.C. at 76 n. 14, 264 F. 2d at 362 n. 14. The Commission and the courts have held in similar cases that the word "willfulness" is not to be interpreted more narrowly in Section 9(b) of the APA than in Section 15(b) of the Exchange Act.^{13/} Professor Loss states that in a proceeding

^{13/} See, e.g., Sterling Securities Co., 37 S.E.C. 837, (1957); Lile & Co., Inc., Securities Exchange Act Release No. 7644 p. 3 [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,259 (July 9, 1965). See also, Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 110 (C.A. 2, 1967).

such as the present one, where willfulness is required under Section 15(b), the APA provision "probably raises no question" since "there is little reason to suppose that 'willfulness' means more here than it does in §15(b)." 2 Loss, Securities Regulation 1312-13 (2d ed. 1961).

"Willfulness" under the APA has been defined by the courts to mean simply the intentional doing of the act charged, and a finding of specific intent to violate the law is not required. This is precisely the same meaning given to "willfulness" under Section 15(b) of the Exchange Act by the Commission and the courts. As this Court said in Hughes v. Securities and Exchange Commission, 85 U.S. App. D.C. 56, 64, 174 F.2d 969, 977 (1949):

"It is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing.' It does not mean that, in addition, he must suppose that he is breaking the law." 13/

14/ Schwebel v. Orrick, 153 F. Supp. 701, 705 (D. D.C. 1957) aff'd 102 U.S. App. D.C. 210, 251 F. 2d 919, certiorari denied, 356 U.S. 927 (1958). Accord, Great Western Food Distributors v. Brannan, 201 F. 2d 476 (C.A. 7, 1953) certiorari denied, 345 U.S. 997 (1953); Goodman v. Benson, 286 F. 2d 896 (C.A. 7, 1961); Capital Packing Co. v. United States, 350 F. 2d 67 (C.A. 10, 1965).

15/ Accord, Norris & Hirshberg v. Securities and Exchange Commission, 85 U.S. App. D.C. 268, 177 F. 2d 228 (1949); Tager v. Securities and Exchange Commission, 344 F. 2d 5 (C.A. 2, 1965); Gearhart & Otis v. Securities and Exchange Commission, 121 U.S. App. D.C. 186, 348 F. 2d 798 (1965); Dlugash v. Securities and Exchange Commission, 373 F. 2d 107 (C.A. 2, 1967); Hanly v. Securities and Exchange Commission, 415 F. 2d 589 (C.A. 2, 1969).

Thus, there is no basis for petitioners assertion that Congress intended the term "willfulness" found in Section 9(b) of the APA to have a different meaning than the same term in Section 15(b) of the Exchange Act and petitioners cite no cases to support this proposition.^{16/}

The record in this case clearly shows that the violations by petitioners were willful. Certainly petitioners false and misleading representation that the mortgages never exceeded 75% of the value of the property or that they were all first liens on the property (App. 3-4 and n. 7), could not have been anything but willful since petitioners as broker-dealers knew and had a duty to know the accuracy of their statements (App. 3).^{17/} Indeed, as the Commission stated, the fraud violations alone would support the sanctions imposed on petitioners (App. 9). In addition, as the Commission found, petitioners sold securities which they knew were not registered when they knew or should have known that no exemption was available (App. 7-8); and registrant and Sommer were repeatedly informed of specific record-keeping deficiencies by the Commission staff, yet they failed to keep current or even accurate records, much less to comply with the record-keeping requirements (App. 8).

^{16/} Petitioners suggest that the language used to define "willfulness" in Capital Packing Co. v. United States, 350 F. 2d 67, 79 (C.A. 10, 1965) shows a distinction between the meaning of the term in Section 9(b) of the APA and in Section 15(b) of the Exchange Act. From our reading of this case, we are unable to see any such distinction.

^{17/} See e.g., Hanly v. Securities and Exchange Commission, 415 F. 2d 589 (C.A. 2, 1969). Securities and Exchange Commission v. North American Research and Development Corp., CCH Fed. Sec. L. Rep. ¶92,620 (C.A. 2, March 25, 1970).

Petitioners also contend that their violations were not willful, by any definition, because they relied in good faith on the advice of counsel and the Commission's staff letter of October 1964 and were not aware they were violating the securities laws. (Br. 9, 11). In its opinion the Commission specifically rejected this defense, finding that petitioners did not rely on the advice of counsel in good faith since they knew or should have known that the facts as represented in the letters of Century's counsel, and on which the 1964 staff interpretation was based, were either not in conformance with the true facts or were misleading in material respects (App. 6-7). And, as the Commission has frequently held, neither reliance on the advice of counsel nor absence of intention to violate the law can negate willfulness within the meaning of the securities laws.^{18/} Furthermore, counsel's advice provides no defense to the violations of the antifraud provisions, which as noted supra, the Commission found would have alone justified the sanctions.

As additional reasons for reversal of the Commission's order petitioners urge (a) that the Commission was barred by the doctrine of estoppel from sanctioning petitioners for their participation in the sale of unregistered mortgage notes and (b) that the proceedings before the Commission were the result of illegal entrapment (Br. 1, 5-6).

^{18/} See, e.g., Gearhart & Otis, Inc., Securities Exchange Act Release No. 7329, pp. 8, 34 (June 2, 1964), aff'd 121 U.S. App. D.C. 186, 348 F.2d 798 (1965).

Several essential elements of the theory of equitable estoppel^{19/} are missing from the facts in this case, including reasonable reliance by petitioners on the staff letter, (App. 7) and petitioners' lack of knowledge of the true facts, which, as the Commission specifically found, petitioners knew or should have known (App. 7). Further, the courts have consistently held that equitable estoppel cannot be used to prevent an administrative agency from enforcing the law.^{20/}

Finally, even assuming for the sake of argument that the defense of entrapment would be available in an administrative proceeding of a remedial nature, the record in this case is void of any evidence of entrapment. As the Supreme Court indicated in Sherman v. United States, 356 U.S. 369, 372 (1958) (cited by petitioners, Br. 6, n. 18), the test of entrapment in a criminal case is whether the intent to commit the crime originated with the defendant or whether it was generated in the defendant's mind by the Government.^{21/} There is no evidence in the

19/ See, e.g., the definition of estoppel in Parker v. Sager, 85 U.S. App. D.C. 4, 8, 174 F.2d 657, 661 (1949).

20/ Automobile Club v. Commissioner, 353 U.S. 180, 183 (1957). Accord, Securities and Exchange Commission v. Morgan, Lewis & Bockius, 209 F.2d 44, 49 (C.A. 3, 1953); Capital Funds v. Securities and Exchange Commission, 348 F.2d 582 (C.A. 8, 1965); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 284 (C.A. 2, 1959).

We note that Stockstrom v. Commissioner, 88 U.S. App. D.C. 286, 190 F.2d 283 (1951), relied upon by petitioners (Br. 6, n. 17) for the proposition that the doctrine of estoppel could be invoked against the Commissioner of Internal Revenue was overruled on that point in Automobile Club v. Commissioner, 353 U.S. 180, 183-84 (1957).

21/ Accord, Sorrells v. United States, 287 U.S. 435, 441 (1932).

record that the Commission or any member of its staff in any way solicited, inspired, incited, persuaded or otherwise prompted petitioners to either sell unregistered securities or to resort to fraud in doing so. To the contrary, the Commission's staff specifically warned, in the letter on which petitioners purport to have innocently relied, that its opinion as to the registration exemption was limited to the facts disclosed, which facts petitioners knew or should have known were incomplete and misleading (App. 6-7).

CONCLUSION

For the foregoing reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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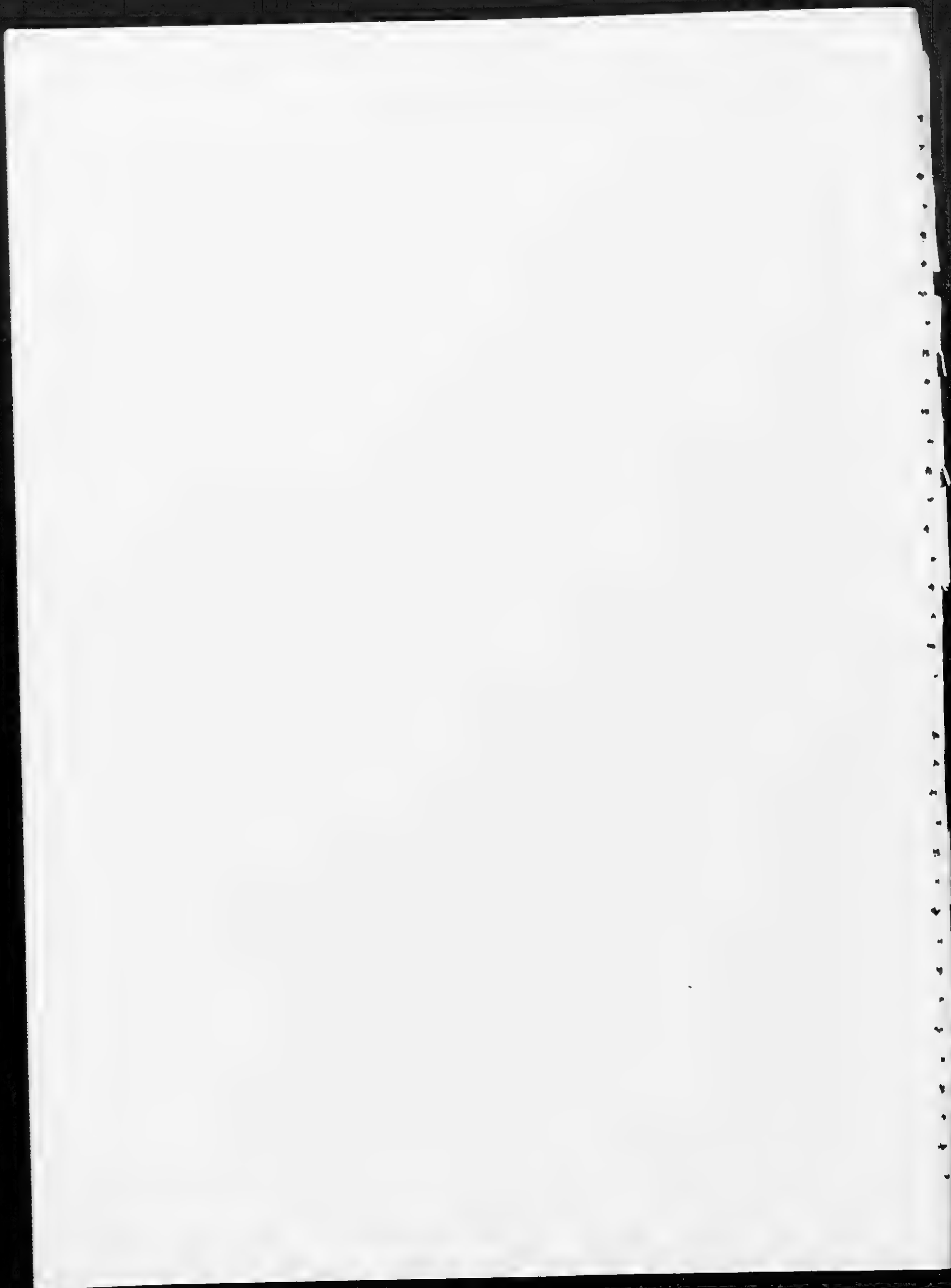
KATHRYN B. McGRATH
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

Dated: June 1970



STATUTORY APPENDIX



Administrative Procedure Act**Section 7(c), 5 U.S.C. 556(d):**

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 9(b), 5 U.S.C. 558(c):

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 368.)

Securities Act of 1933

Section 5(a), (c), 15 U.S.C.

~~78~~e(a), (c):
77

**Prohibitions Relating to Interstate Commerce
and the Mails**

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;⁴ or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * *

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.³

Section 17(a), 15 U.S.C. 77q(a):

Fraudulent Interstate Transactions

SEC. 17. (a) It shall be unlawful for any person in the offer or⁴ sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Rules Under the Securities Act of 1933

Rule 234, 17 CFR 230.234:

Rule 234 Exemption of First Lien Notes

(a) Promissory notes directly secured by a first lien on a single parcel of real estate upon which is located a dwelling or other residential or commercial property shall be exempt from registration under the Act if such notes are offered in accordance with the following terms and conditions:

(1) Neither the aggregate unpaid principal amount of the notes secured by the lien on the property nor the aggregate amount at which such notes are offered to the public shall exceed \$100,000;

(2) The aggregate unpaid principal amount of all indebtedness secured by the first lien on the property shall not exceed 75 percent of the appraised value of such property;

(3) The principal amount of each note to be offered under this regulation shall not be less than \$500, and the total number of notes secured by the first lien on the property shall not exceed 125; and

(4) The notes shall be sold for cash or purchasers' obligations to pay cash within 60 days after sale.

(b) Interests or participations in, or promissory notes secured by a lien upon, another note or notes which are in turn secured by a first lien upon real estate shall not be deemed to be directly secured by a first lien on real estate within the meaning of this rule.

(c) No exemption shall be available under this rule for any investment contract or other security the offering of which is involved in the offering of the notes directly secured by a first lien upon real estate.

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. 78j(b):

**Regulation of the Use of Manipulative and
Deceptive Devices**

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934 (continued)
Section 15(b), 15 U.S.C. 78o(b):

(b) (1) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to

such broker or dealer and any persons associated with such broker or dealer as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

(2) An application for registration of a broker or dealer to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application shall contain such information in such detail as to the applicant and as to the successor and any person associated with the applicant or the successor, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine. Such registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt such application as its own.

(3) If any amendment to any application for registration pursuant to this subsection is filed prior to the effective date of the registration, such amendment shall be deemed to have been filed simultaneously with and as part of such application; except that the Commission may, if it appears necessary or appropriate in the public interest or for the protection of investors, defer the effective date of any such registration as thus amended until the thirtieth day after the filing of such amendment.

(4) Any provision of this title (other than section 5 and subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any broker or dealer registered pursuant to this subsection or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or any means or

Securities Exchange Act of 1934 (continued)
Section 15(b), 15 U.S.C. 78o(b):

instrumentality of interstate commerce in connection therewith.

(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of the application or at any time thereafter of any felony or misdemeanor which the Commission finds—

(i) involves the purchase or sale of any security.

(ii) arises out of the conduct of the business of a broker, dealer, or investment adviser.

(iii) involves embezzlement, fraudulent conversion, or misappropriation of funds or securities.

(iv) involves the violation of section 1341, 1342, or 1343 of title 18, United States Code.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, or of the Investment

Securities Exchange Act of 1934 (continued)
Section 15(b), 15 U.S.C. 78o(b):

Advisers Act of 1940, or of the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Investment Advisers Act of 1940, or the Investment Company Act of 1940, or of this title, or of any rule or regulation under any of such statutes or has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to an order of the Commission entered pursuant to paragraph (7) of this subsection (b) barring or suspending the right of such person to be associated with a broker or dealer, which order is in effect with respect to such person.

(6) Pending final determination whether any registration under this subsection shall be denied, the Commission may by order postpone the effective date of such registration for a period not to exceed fifteen days, but if, after appropriate notice and opportunity for hearing (which may consist solely of affidavits and oral arguments), it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration until final determination, the Commission shall so order. Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and

opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer, or any broker or dealer for whom an application for registration is pending, is no longer in existence or has ceased to do business as a broker or dealer, the Commission shall by order cancel the registration or application of such broker or dealer.

(7) The Commission may, after appropriate notice and opportunity for hearing, by order censure any person, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause (A), (D) or (E) of paragraph (5) of this subsection or has been convicted of any offense specified in clause (B) of said paragraph (5) within ten years of the commencement of the proceedings under this paragraph or is enjoined from any action, conduct, or practice specified in clause (C) of said paragraph (5). It shall be unlawful for any person as to whom such an order barring or suspending him from being associated with a broker or dealer is in effect, willfully to become, or to be, associated with a broker or dealer, without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him, without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care, should have known, of such order.

(8) No broker or dealer registered under section 15 of this title shall, during any period when it is not a member of a securities association registered with the Commission under section 15A of this title, effect any transaction in, or induce the purchase or sale of, any security (otherwise than on a national securities exchange) unless such broker or dealer and all natural persons associated with such broker or dealer meet such specified and ap-

Securities Exchange Act of 1934 (continued)
Section 15(b), 15 U.S.C. 78o(b):

appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable. The Commission shall establish such standards by rules and regulations, which may—

(A) appropriately classify brokers and dealers and persons associated with brokers and dealers (taking into account relevant matters, including types of business done and nature of securities sold).

(B) specify that all or any portion of such standards shall be applicable to any such class.

(C) require persons in any such class to pass examinations prescribed in accordance with such rules and regulations.

(D) provide that persons in any such class other than a broker or a dealer and partners, officers, and supervisory employees (which latter term may be defined by the Commission's rules and regulations and as so defined shall include branch managers of brokers or dealers) of brokers or dealers, may be qualified solely on the basis of compliance with such specified standards of training and such other qualifications as the Commission finds appropriate.

The Commission may prescribe by rules and regulations reasonable fees and charges to defray its costs in carrying out this paragraph, including, but not limited to, fees for any examination administered by it, or under its direction. The Commission may cooperate with securities associations registered under section 15A of this title and with national securities exchanges in administering examinations and may require brokers and dealers subject to this paragraph and persons associated with such brokers and dealers to pass examinations administered by or on behalf of any such association or exchange and to pay to such association or exchange reasonable fees or charges to defray the costs incurred by such association or exchange in administering such examinations.

(9) In addition to the fees and charges authorized by paragraph (8), each broker or dealer registered under section 15 of this title not a member of a securities association registered pursuant to section 15A of this title shall pay to the Commission such reasonable fees and charges as may be necessary to defray the costs of additional regulatory duties required to be performed by the Commission because such broker or dealer is not a

member of such a securities association. The Commission shall establish such fees and charges by rules and regulations.

(10) No broker or dealer subject to paragraph (8) of this subsection shall effect any transaction in, or induce the purchase or sale of, any security (otherwise than on a national securities exchange) in contravention of such rules and regulations as the Commission may prescribe designed to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and in general to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market.¹

Securities Exchange Act of 1934 (continued)
Section 15(c), 15 U.S.C. 78o(c):

(c) (1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

(2) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(3) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or com-

Securities Exchange Act of 1934 (continued)
Section 15(c), 15 U.S.C. 78o(c):

mercial bills) otherwise than on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of brokers and dealers.²

(4) If the Commission finds, after notice and opportunity for hearing, that any person subject to the provisions of section 12, 13, or subsection (d) of section 15 of this title or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person to comply with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

(5) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.²

(d) Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or

for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 12 of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.³

Securities Exchange Act of 1934 (continued)
Section 15A, 15 U.S.C. 78o-3:

SECTION 15A. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association."

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section.

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section.

(3) the rules of the association provide that any broker or dealer who makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may

become a member of such association, except such as are excluded pursuant to paragraph (4) or (5) of this subsection, or a rule of the association permitted under this paragraph. The rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section. Rules adopted by the association may provide that the association may, unless the Commission directs otherwise in cases in which the Commission finds it appropriate in the public interest so to direct, deny admission to or refuse to continue in such association any broker or dealer if—

(A) such broker or dealer, whether prior or subsequent to becoming such, or

(B) any person associated with such broker or dealer, whether prior or subsequent to becoming so associated,

has been and is suspended or expelled from a national securities exchange or has been and is barred or suspended from being associated with all members of such exchange, for violation of any rule of such exchange.

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if such broker or dealer—

(A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange or has been and is barred or suspended from being associated with all members of such association or from being associated with all brokers or dealers which are members of such exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which consti-

Securities Exchange Act of 1934 (continued)
Section 15A, 15 U.S.C. 78o-3:

tutes conduct inconsistent with just and equitable principles of trade.

(B) is subject to an order of the Commission denying, suspending for a period not exceeding twelve months, or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or barring or suspending him from being associated with a broker or dealer.

(C) whether prior or subsequent to becoming a broker or dealer, by his conduct while associated with a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such broker or dealer, and in entering such a suspension, expulsion, or order, the Commission or any such exchange or association shall have jurisdiction to determine whether or not any person was a cause thereof.

(D) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person who, if such person were a broker or dealer, would be ineligible for admission to or continuance in membership under clause (A), (B), or (C) of this paragraph.

(5) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no person shall become a member and no natural person shall become a person associated with a member, unless such person is qualified to become a member or a person associated with a member in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and in the case of a member, the financial responsibility of such member. For the purpose of defining such standards and the application thereof, such rules may—

(A) appropriately classify prospective members (taking into account relevant matters, including type of business done and nature of securities sold) and persons proposed to be associated with members.

(B) specify that all or any portion of such standards shall be applicable to any such class.

(C) require persons in any such class to pass examinations prescribed in accordance with such rules.

(D) provide that persons in any such class other than prospective members and partners, officers and supervisory employees (which latter term may be defined by such rules and as so defined shall include branch managers of members) of members, may be qualified solely on the basis of compliance with specified standards of training and such other qualifications as the association finds appropriate.

(E) provide that applications to become a member or a person associated with a member shall set forth such facts as the association may prescribe as to the training, experience, and other qualifications (including, in the case of an applicant for membership, financial responsibility) of the applicant and that the association may adopt procedures for verification of qualifications of the applicant.

(F) require any class of persons associated with a member to be registered with the association in accordance with procedures specified by such rules (and any application or document supplemental thereto required by such rules of a person seeking to be registered with such association shall, for the purposes of subsection (a) of section 32 of this title, be deemed an application required to be filed under this title).

(6) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs.

(7) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration.

(8) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public in-

Securities Exchange Act of 1934 (continued)
Section 15A, 15 U.S.C. 78o-3:

terest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges.

(9) the rules of the association provide that its members and persons associated with its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or being suspended or barred from being associated with all members, or any other fitting penalty, for any violation of its rules.

(10) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and persons associated with members and the denial of membership to any broker or dealer seeking membership therein or the barring of any person from being associated with a member. In any proceeding to determine whether any member or other person shall be disciplined, such rules shall require that specific charges be brought; that such member or person shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include—

(A) a statement setting forth any act or practice in which such member or other person may be found to have engaged, or which such member or other person may be found to have omitted.

(B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation.

(C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade.

(D) a statement setting forth the penalty imposed.

In any proceeding to determine whether a broker or dealer shall be denied membership or whether any person shall be barred from being associated with a member, such rules shall provide that the broker or dealer or person shall

be notified of, and be given an opportunity to be heard upon, the specific grounds for denial or bar which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial or bar is based.

(11) the requirements of subsection (c), insofar as these may be applicable, are satisfied.

(12) the rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be disseminated by any member or any person associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, both at the wholesale and retail level, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting and publishing quotations.

The provisions of this subsection, as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, shall be applicable to the rules of any registered securities association which was registered on such date until July 1, 1964. After July 1, 1964, the Commission may, after notice and opportunity for hearing, suspend the registration of any such association if it finds that the rules thereof do not conform to the requirements of this subsection, as amended by section 7 of the Securities Acts Amendments of 1964, and any such suspension shall remain in effect until the Commission issues an order determining that such rules have been modified to conform with such requirements.¹

(c) The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b), to provide for the admission of an association registered as an affiliated securities association, pursuant to subsection (d), to participation in said applicant association as an affiliate thereof, under terms permitting such power and responsibilities to such affiliates, and under such other appropriate terms and conditions, as may be provided by the rules of said applicant association, if such rules appear to the

Securities Exchange Act of 1934 (continued)
Section 15A, 15 U.S.C. 78o-3:

Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section. The duties and powers of the Commission with respect to any national securities association or any affiliated securities association shall in no way be limited by reason of any such affiliation.

(d) An applicant association shall not be registered as an affiliated securities association unless it appears to the Commission that—

(1) such association, notwithstanding that it does not satisfy the requirements set forth in paragraph (1) of subsection (b), will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to said subsection (b), in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c); and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (10), inclusive, and paragraph (12), of subsection (b); except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.¹

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall revoke the registration of such affiliated securities association.

(f) A registered securities association (whether national or affiliated) may, upon such reasonable notice as the Commission may deem necessary in the public interest or for the protection of inves-

tors, withdraw from registration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe. Upon the withdrawal of a national securities association from registration, the registration of any association affiliated therewith shall automatically terminate.

(g) If any registered securities association (whether national or affiliated) takes any disciplinary action against any member thereof or any person associated with such a member or denies admission to any broker or dealer seeking membership therein, or bars any person from being associated with a member, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h), unless the Commission otherwise orders after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of affidavits and oral arguments).²

(h) (1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof or a person associated with a member, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant—

(A) finds that such member or person has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and

(B) determines that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association,

the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by

Securities Exchange Act of 1934 (continued)
Section 15A, 15 U.S.C. 78o-3:

any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Commission that the evidence does not warrant the finding required in clause (A), or if the Commission determines that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member or person associated with a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association or the barring of any person from being associated with a member, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, determines that the specific grounds on which such denial or bar is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein, or to permit such person to be associated with a member.¹

(i) (1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember broker or dealer (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "nonmember broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association,

except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills.

(3) Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k) (1) The Commission is authorized by order to abrogate any rule of a registered securities association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested, or with such modifications of such alteration or supplement as it

Securities Exchange Act of 1934 (continued)
Section 15A, 15 U.S.C. 78o-3:

deems necessary if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to—

(A) the basis for, and procedure in connection with, the denial of membership or the barring from being associated with a member or the disciplining of members or persons associated with members, or the qualifications required for members or natural persons associated with members or any class thereof.

(B) the method for adoption of any change in or addition to the rules of the association.

(C) the method of choosing officers and directors.

(D) affiliation between registered securities associations.¹

(l) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this section.

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof, or to suspend for a period not exceeding twelve months or to bar any person from being associated with a member thereof, if the Commission finds that such member or person—

(A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provi-

sion of this title or any rule or regulation thereunder.

(B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation.

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.²

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.³

Securities Exchange Act of 1934
(continued)

Section 25(a), 15 U.S.C. 78y(a):

Section 17(a), ¹⁵ 17 U.S.C. 78q(a):

**Accounts and Records, Reports, Examinations
of Exchanges, Members, and Others**

SECTION 17. (a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association,¹ and every broker or dealer registered pursuant to section 15 of this title,² shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

SECTION 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Rules Under the Securities Exchange Act of 1934

Rule 10b-5, 17 CFR 240.10b-5:

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 15c1-2, 17 CFR 240.15c1-2:

Rule 15c1-2. Fraud and Misrepresentation

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance," as used in section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive or other fraudulent device or contrivance," as used in section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(c) The scope of this rule shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to section 15(c)(1) of the Act.

IN THE
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

ABBETT SOMMER & CO., INC., et al.

Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION

Respondent

FILED AUG 6 1970

Nathan J. Paulson
No. 23, 698 ~~CLERK~~

MEMORANDUM OF PETITIONERS IN REPLY
TO BRIEF OF RESPONDENT

In its brief, the Securities and Exchange Commission has misunderstood and thus clouded the issues and misinterpreted the arguments made in Petitioners' Brief. In order to clarify the issues in the case and the arguments which Petitioners made, Petitioners submit this Memorandum to the Court in the belief that it will aid the Court in deciding the issues before it.

One such clouding and misinterpretation is the act of changing the issue of whether the Commission may change the standard of "substantial" evidence which must support findings to a lower standard. It is not as counsel for the Commission would like this Court to believe, whether the decision is supported by substantial evidence. Petitioners contend that the Commission never decided that question, and that thus the issue is as

Petitioners have stated.

As counsel for Respondents have acknowledged in their brief, in the proceedings before the Commission, Petitioners contended that any punitive or remedial action taken by any administrative agency must be supported by "reliable, probative and substantial" evidence as required by Section 7(c) of the Administrative Procedure Act. Petitioners further contended that this requirement is a higher standard of proof than the "preponderance of the evidence" test admittedly used by the Hearing Examiner. Thus, Petitioners alleged, the Hearing Examiner's decision could not be upheld since he had used an incorrect and less stringent standard of evidence than that required by the Administrative Procedure Act.

The Commission, in holding that it could decide on the basis of "preponderance" rather than "substantial" did not dispute Petitioners' argument that the test used was less exacting than the "reliable, probative and substantial" evidence test contained in the Act. It would be ludicrous indeed for Petitioners to appeal on these grounds if, as the Commission alleges in its Brief, "preponderance" were a stronger evidentiary test than "substantial". It is equally ludicrous for counsel for Respondent to come into court now and say that the Commission really meant that "preponderance" is a higher standard than "substantial" when it accepted Petitioners' argument that it was a lower standard. Just as a government "agency may not change its theories [of the offense] in mid-stream without giving respondents reasonable notice of the change," Rodale Press, Inc. v. F.T.C., 407 F. 2d 1252, 1256 (D.C. Cir. 1958), counsel for the Respondent

cannot, after this case reaches the courts, change the Commission's theory that "preponderance" was a lower test of evidence than "substantial" evidence.

Petitioners further contend that in cases involving fraud, the evidence against the Petitioners must be "clear and convincing", and that this is especially true where Petitioners lose their right to their chosen vocation upon a finding that fraud was committed. Counsel for Respondent do not deny that in administrative proceedings involving banishment from the country, the government agency may decide upon banishment only if its findings are supported by clear and convincing evidence. Without citation, though, counsel for Respondent do engage in the curious argument that there is a different standard in deportation cases than in other administrative proceedings such as securities cases because "deportation proceedings involve a special area of the law." Brief of Respondent, page 13. Administrative proceedings which result in the loss of the right to pursue a vocation are equally as harsh as proceedings which result in deportation -- both "result in the loss of all that makes life worthwhile". Bridges v. Wixon, 326 U.S. 135, 147, quoting Ng Fung Ho v. White, 259 U.S. 276, 284. Contra, Brief for Respondents, page 13. Moreover, both revocation of a license to do business or pursue a vocation and deportation, while technically not criminal punishment, are of a penal nature. "[P]ermanent proscription from Government Service is 'punishment' and that punishment can be inflicted only upon compliance with the Sixth Amendment. The difference between permanent and limited proscription is merely one of degree and not one of principal." Bailey v. Richardson, 182 F. 2d 46, 55 (D. C. Cir. 1950).

See also Bridges v. Wixon, supra at 147. Contra, Brief of Respondent, page 11.

Regarding the issue of "willfulness", counsel for Respondent have changed the position taken by Petitioners. Counsel for Respondent say that "Petitioners suggest that the language used to define 'willfulness' in Capitol Packing Co. v. United States, 350 F. 2d 67, 79 (C.A. 10 1965) shows a distinction between the meaning of the term in Section 9(b) of the APA and in Section 15(b) of the Exchange Act." This statement is false and misleading. Petitioners contend that Section 9(b) of the Administrative Procedure Act requires more than the mere intentional engaging in an act. "Willfulness must be manifest." H.R. REP. NO. 1980, 79th Cong, 2d Sess. 41 (1946) (Emphasis added). As stated by the United States Court of Appeals for the Tenth Circuit in Capitol Packing Co., supra. at 79, in affirming the legislative intent of the Congress, a finding of willfulness requires a finding of "an intentional misdeed or gross neglect of a known duty as to be the equivalent thereof". (Emphasis added.) Contra, Brief for Respondent, page 18, wherein counsel for Respondent, while ignoring all legislative history, contend that under the Administrative Procedure Act, "willfully" means "simply the intentional doing of an act charged."

Counsel for the Respondent contend that "willfulness" under the Exchange Act means the intentional doing of an act charged and that this definition precludes a defense that reliance upon the advice of counsel and the Commission constitutes a defense to the charge of willful violation of the Exchange Act. Petitioners disagree completely with this position of counsel for Respondent and rely upon Petitioner's Brief, pages 9-11.

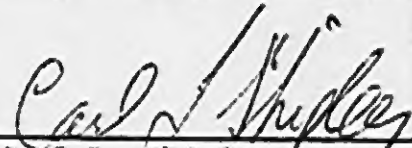
Counsel for Respondent argue that, even if Petitioners were correct in saying that reliance upon advice of Counsel and the Commission constitutes a defense to the charge of willfulness, this Court must still rely upon and uphold, according to said counsel, the conjecture of the Commission that the Petitioners either knew or should have known that advice of counsel and the Commission was based on false information. In a case on all fours with this one, United States v. Crosby, 294 F. 2d 928 (2d Cir. 1961), the Court of Appeals failed to apply such an argument where broker-dealers relied similarly upon the advice of counsel for the issuer of the securities. The Court of Appeals in that case held that it could not "assume guilty knowledge or purpose". Supra at 942. Guilty knowledge or purpose, as it is a basic element of the offense charged, must be proven, not assumed. Crosby at 942-3. Indeed, as should be apparent to counsel for Respondent, the assumption of guilty knowledge or purpose would automatically preclude any broker or dealer relying upon the defense of advice of counsel.

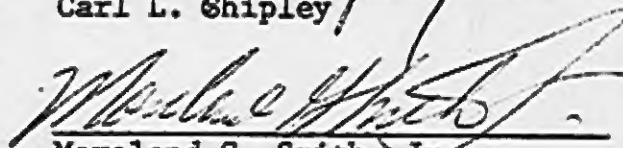
Finally, counsel for Respondent evidently misunderstand Petitioners' position with regard to entrapment and estoppel. As we have seen, it is mere conjecture or assumption for the Respondent to say in the absense of any evidence of guilty knowledge (no effort being made to introduce any such evidence in the proceeding below), that Petitioners were aware of the inaccuracy of the facts relied upon by the Commission in giving the Petitioners and Century a "no action" letter. It is a fact that the Petitioners did not supply the Commissioners with any of the facts found to be inaccurate. It is also a fact that the Petitioners were not aware of the facts upon which the Commission relied in giving the advice, as the Commission kept

secret those facts. Where the Petitioners supplied no facts at all to the Commission, where the Commission prevented Petitioners from knowing upon which facts it relied, the Petitioners had no means of ascertaining the accuracy of these facts.

Petitioners again respectfully submit that, for the reasons stated above and for the reasons stated in the Brief for Petitioners, the findings, order and conclusions of the Securities and Exchange Commission should be reversed and the case should be remanded to the Commission for such further proceedings as may be appropriate.

Respectfully submitted,


Carl L. Shipley


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Attorneys for Petitioners

Dated: July 9, 1970

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23, 658

September Term, 1969

Abbett, Sommer & Co., Inc. et al

Petitioners

vs.

The Securities and Exchange Commission

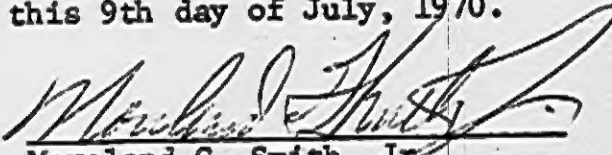
Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has forwarded 3 copies
of the Memorandum of Petitioners in Reply to Brief of Respondent to:

Walter North, Esq.
Assistant General Counsel
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

via first class mail, postage prepaid, this 9th day of July, 1970.


Moreland G. Smith, Jr.
Attorney for Petitioners